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REVOCATION AND REVIVAL OF WILLS

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PART III*

EXCEPT FOR one other state,[1] New York has the distinction of being a jurisdiction where issues concerning revocation and revival have been made the basis of more extensive litigation than is usually the case. It should be noted, however, that in all but one instance[2] the courts of that state have had the guidance of a statute regulating both revocation and revival[3] so most of these decisions concern themselves with the application of statutory language or its interpretation. While that statute declares that

* The first part of this article appeared in 25 CHICAGO-KENT LAW REVIEW 185-215, the second at pp. 271-323.

1 Pennsylvania possesses more reported cases on the general subject than any other state.

2 The case of Walton v. Walton, 7 Johns. Ch. 258 (N. Y., 1823), was one where the will devised realty and bequeathed personalty. Testator adeemed the personalty and contracted to convey the realty. The court held that these acts operated to revoke the will even though the contract to convey was subsequently rescinded. The court, at p. 270, then said: "If a will be once absolutely revoked, whether directly or impliedly, it must be gone forever. It cannot be restored without due republication." Had that language been necessary to the decision it could well be said that the New York court anticipated the English statute of 1 Vict. c. 26 by fourteen years and made the statute set out in the next succeeding note unnecessary.

3 N. Y. Thompson Cons. Laws 1939, Vol. 1, Decedent Estate Law. Section 34 thereof states: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed . . ." Revival is dealt with in Section 41 which reads: "If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless . . . he shall duly republish his first will."

revocation may be accomplished by a later will or some "other writing," it does not, according to *Simmons* v. *Simmons*,[4] prevent the possibility that revocation might also be produced by a later inconsistent will, and, if such a will exists, it is not necessary that it speak expressly on the subject for the phrase "declaring such revocation" was there held to apply to and be designed to modify the words "some other writing."[5] If the revocation is to be produced by some "other writing," however, that writing must measure up to statutory requirements concerning its execution and attestation. Thus, in the case of *In re Aker's Will*,[6] a holographic will bore a signed notation in the margin that the will was revoked. The notation was held to be ineffective for lack of attestation and failed to serve as a cancellation since no part of the notation touched the provisions of the will.

Admittedly, a properly executed subsequent will expressly declaring the revocation of prior wills should produce that effect, but most of the difficulty in the New York cases involving revocation alone has been over the point of establishing that there was, at least at one time, such a revoking will. Failure on the part of the contestants, in *Nelson* v. *McGiffert*,[7] to prove that the alleged revoking will contained an express clause or to show that its provisions were inconsistent with the earlier will led to the probate of the earlier instrument. One competent witness would be sufficient for that purpose, according to the case of *In re Wear's Will*,[8] for the court there distinguished between establishment of the contents of the subsequent will for purpose of revocation and the necessity of having two witnesses to insure its probate as a lost will.[9] Whether testator's attorney, hired to attend to the execu-

[4] 26 Barb. 68 (N. Y., 1857).

[5] As to the grammatical construction of statutes like the one involved, see 25 CHICAGO-KENT LAW REVIEW 201-2.

[6] 74 App. Div. 461, 77 N. Y. S. 643 (1902), affirmed in 173 N. Y. 620, 66 N. E. 1103 (1903).

[7] 3 Barb. Ch. 158 (N. Y., 1848).

[8] 131 App. Div. 875, 116 N. Y. S. 304 (1909).

[9] The court in the case of In re Palmer's Will, 122 Misc. 177, 203 N. Y. S. 487 (1923), pointed out what it considered to be "a legislative oversight" in requiring proof by two witnesses to the fact of destruction of a will if done in the presence

tion of the revoking will, is competent to serve as a witness to its contents has been the matter of some debate. The case of *In re Cunnion's Will*[10] would indicate that the common-law rule which forbade the attorney from revealing the client's confidence during the client's lifetime but permitted disclosure after the testator's death has been reversed by a statute in that state and, as a consequence, the testimony of the drafting attorney was inadmissible to prove the contents of the later, but presumably destroyed, will. If the attorney has served as an attesting witness, however, the statute recognizes this fact as a waiver of any confidential communication so, under the holding in *In re Ford's Will,*[11] he then becomes competent to testify as to the contents of the alleged revoking will,[12] even though that may lead to the result that the client is declared to have died intestate.

The circumstances under which a will may be revoked having been established, it is now possible to turn to the New York cases dealing with revival. The tenor of the decisions regarding revocation would indicate that an effective revocatory instrument would operate immediately upon execution, whether expressly so declaring[13] or merely impliedly achieving that result,[14] regardless of its ultimate fate. That being so, an act of some sort on the part of the testator would be essential to renew the life of the revoked will. The revival provision declares that the destruction, cancellation or revocation of the subsequent will shall not, *ipso facto,* produce a revival and that statute has been given a literal reading

of the testator by another person, but leaving the door open to proof by only one witness if the alleged revocation took the form of a subsequent revoking will which could no longer be produced because lost or presumably destroyed. It said such practice "leaves the door open to some of the same kind of abuse or fraud as it was designed to prevent." The court did not refuse to follow the rule but did scrutinize the testimony of the single witness carefully, refused to believe it, and admitted the earlier will to probate.

[10] 201 N. Y. 123, 94 N. E. 648 (1911).

[11] 135 Misc. 630, 239 N. Y. S. 252 (1930). Dicta in Mead v. Herdman, 161 App. Div. 177, 146 N. Y. S. 353 (1914), to the effect that any such waiver is annulled when the testator destroys the revoking will, was there repudiated.

[12] Accord: In re Hedge's Will, 136 Misc. 230, 242 N. Y. S. 415 (1930).

[13] In re Ford's Will, 135 Misc. 630, 239 N. Y. S. 252 (1930); In re Palmer's Will, 122 Misc. 177, 203 N. Y. S. 487 (1923).

[14] Walton v. Walton, 7 Johns. Ch. 258 (N. Y., 1823).

in several instances.[15] It does specify, though, that intention to revive the former will may be evidenced "by the terms of such revocation," and it has been necessary to interpret this phrase particularly as to whether or not oral statements accompanying the act of destroying the second will are sufficient to disclose the "terms" of the revocation. In the case of *In re Stickney's Will,*[16] the testator, having a will dated in 1893, made another in 1895 which expressly revoked all former wills. The 1895 will was later subjected to physical destruction by the testator who orally announced to persons then present that he wanted the first will to be effective. It was claimed that such conduct revived the 1893 will, but the court held otherwise saying that, if the revoking instrument was physically destroyed, the original will must be republished. The court also indicated that the phrase "appear by the terms of such revocation" related only to situations wherein the subsequent instrument was nullified by some later writing of sufficient dignity to produce that result, in which writing the intention to revive could, and should, be adequately disclosed. If the statute required that the intention to revive should appear "by the *written* terms of such revocation," such statement would be unquestionably correct, but there seems little basis for importing the word "written" into the statutory language in view of the alternative methods permitted both as to revocation and revival. Oral statements as to revival made by testatrix in the presence of one of the attesting witnesses to the original will and uttered simultaneously with the physical destruction of the revoking will, were held insufficient, in the case of *In re Kuntz's Will,*[17] for the reason aforementioned plus the additional fact that republication required attention to the formalities necessary for the execution

[15] Ludlam v. Otis, 15 Hun. 410 (N. Y., 1878), destruction of a second inconsistent will; In re Brewster's Estate, 72 App. Div. 587, 76 N. Y. S. 283 (1902), deliberate destruction of will containing an express clause; In re Barnes' Will, 70 App. Div. 523, 75 N. Y. S. 373 (1902), In re Wear's Will, 131 App. Div. 875, 116 N. Y. S. 304 (1909), and In re Hedge's Will, 136 Misc. 230, 242 N. Y. S. 415 (1930), presumed destruction because second will not found but last seen in testator's possession.

[16] 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246 (1899), affirming 31 App. Div. 382, 52 N. Y. S. 929 (1898).

[17] 163 App. Div. 125, 148 N. Y. S. 382 (1914).

of a will in the first instance and one witness was utterly insufficient.

Having thus added the requirement that there must be written evidence to establish the revival of a revoked will if the republication method is not used, the New York courts then proceeded to go still farther, in the case of *In re O'Donovan's Will,*[18] by there insisting that the writing be executed and attested with the full formalities needed for the making of an original will. The testator in that case had appended a signed note to his original will, apparently simultaneously with the act of destroying a later revocatory will, which read: "The will dated January 24, 1921, is my last will—a subsequent will dated January 16, 1925, was destroyed December 19, 1933." There being no evidence of republication, it was argued that such written note should be sufficient to make it "appear by the terms of such revocation" that he intended to revive the earlier will, but the court would not agree although the testator may well have thought this would be enough. Similarly, a notation written on the revocatory will, which had been so obliterated and cancelled as to be unreadable and consequently nullified, indicative of a desire that the first will be restored to full force and effect failed to produce the desired result in the case of *In re McCaffrey's Estate.*[19]

At the same time that the New York courts were providing their own gloss upon the statutory language as it related to the use of complete wills for purpose of revocation and revival, it also became necessary to consider the operation and effect of codicils in the same connection. Two early cases had come to the conclusion that inasmuch as a codicil does not, in the absence of express direction, revoke a will but merely alters the same, it follows that the subsequent destruction of the codicil does not invoke the application of the revival statute, particularly since there is no reference to a codicil therein, but leaves the will to stand as it was

[18] 168 Misc. 362, 6 N. Y. S. (2d) 456 (1938).

[19] 174 Misc. 162, 20 N. Y. S. (2d) 178 (1940).

originally written.[20] In the light thereof, a codicil would seem to possess no more than an ambulatory nature, but when the court came to decide the case of *Osburn* v. *Rochester Trust & Safe Deposit Company*[21] it achieved an entirely different result by holding that a clause in a will once modified by the execution of a codicil is not revived by the subsequent destruction of the codicil so that the property involved must pass as intestate estate. The case suggests a situation which does not appear to have been within the comprehension of the framers of the varied revival provisions but which might well merit attention, *i.e.* how to handle the revival of a partially revoked will. Of course, a valid codicil may well serve as a reviving instrument since it meets all requirements as to re-execution and republication, has always possessed the merit of republishing the will of which it is a part, and could satisfy any captious additional factors made necessary by judicial interpretation of statutory language. It has, therefore, been held in New York that an original will, although expressly revoked by a subsequent will, may be revived by a suitable codicil.[22]

Long prior to any statute, the North Carolina court was called

[20] Matter of Simpson, 56 How. Prac. 125 (N. Y., 1878); Johnston's Will, 69 Hun. 157, 23 N. Y. S. 355 (1893). In the first of these cases, at p. 131, the court pointed out that the word codicil does not appear in the revival provision but that rather it "evidently refers to a testamentary instrument which assumes to dispose of the testator's entire estate, and not to an instrument which is merely an addition or supplement to a former will; and which had no legal entity independent of the existence of the latter."

[21] 209 N. Y. 54, 102 N. E. 571, Ann. Cas. 1915A 101, 46 L. R. A. (N. S.) 983 (1913). The codicil had added an extra legacy of $1000 ahead of the residuary clause in the original will. It was deemed to revoke the residuary clause to the extent of $1000 which sum was not restored by the destruction of the codicil. See also In re Kathan's Will, 141 N. Y. S. 705 (1913), where a codicil had been made to revoke the bequest of a diamond chain, but was itself destroyed by tearing. Testatrix told one witness that her will was in "the red bag in the closet." The red bag contained not only the original will but also the torn codicil. Held: there was no sufficient republication and the legacy of the chain, once revoked, was not revived by the tearing of the codicil.

[22] In re Campbell's Will, 170 N. Y. 84, 62 N. E. 1070 (1902). In that case, a will dated 1897 was followed by one in 1899 containing an express clause of revocation. A codicil dated 1900, reciting that it was a codicil to the 1897 will, also contained a revocatory clause. It was held that both wills were revoked thereby but that the other language in the codicil republished the earlier will as of the date of the codicil. See also In re Knapp's Will, 23 N. Y. S. 282 (1893), where the same result was attained although the codicil lacked an express clause of revocation but did mention the first will and ratified it to the extent that it was not in conflict with other provisions in the codicil.

upon, in *Giles's Heirs* v. *Giles's Executors*,[23] to determine whether parol declarations were adequate to nullify a duly executed and properly witnessed will. The testator there had left his will in the hands of another for safekeeping. On a later occasion he directed the custodian to burn the will but was told that the custodian would not do so although he was willing to surrender it, if desired, so that testator might do as he pleased. The will was never called for, nor burned. The testator also, sometime later, said he had made his will and "it should stand." Upon testator's death the will was offered for probate but was contested by the heirs on the ground that it had been revoked by the parol direction. Probate of the will was held proper on the ground that the testator, by his subsequent statements, obviously did not contemplate dying intestate and that the revocation was not intended to be complete until destruction actually occurred. The court gratuitously added the remark that, had the revocation been completely carried into effect and the will cancelled, "it could not have been revived by any subsequent declaration by parol." Thereafter a statute was enacted which deals with revocation, permitting the same to be produced by a written will, a codicil, a duly executed other writing so declaring, or by a holographic will,[24] but the act is silent as to revival. Since the adoption of that statute, it has been determined that the existence of a later will, which does not contain an express clause of revocation and is only partly inconsistent with the earlier one, is not enough to produce a revocation[25] nor will a later one giving "all my effects" to certain relatives nullify a will devising the testator's land to his daughter, since "effects"

[23] Conf. Rep. 174, 1 N. C. 290 (1801). A note by the reporter states: "The law as to parol revocations of written wills of real estate has since been altered by the act of 1819 (1 Rev. St., Ch. 112, § 12)."

[24] The present statute, N. C. Gen. Stats. 1943, Vol. 2, Ch. 31, § 31-5, reads: "No will or testament in writing, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same . . . signed by him [testator], . . . and subscribed in his presence by two witnesses at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or inserted therein . . ." A recent minor amendment of this provision did not change either the sense or the language of the foregoing.

[25] In re Venable's Will, 127 N. C. 344, 37 S. E. 465 (1900).

is a term relating to personal property and generates no inconsistency.[26]

Neither of the two North Carolina cases touching on the question of revival come to any conclusive result from which it would be possible to catalog that state as following either common law or ecclesiastical lines. In *Love* v. *Johnston*[27] a later will containing an express clause of revocation was held to be the only will of the testator despite the claim that an earlier will had been revived and was to be treated as part of the final will. It appeared, however, that some one had torn testator's signature off the earlier will and that, although he had re-signed the same simultaneously with the making of the new will and had expressed the wish that if anything happened to the later will he wanted the prior one to stand, the earlier will was not re-witnessed. The court based its decision on the ground that an oral republication was insufficient, but it could also have concluded that there was no firm intention to revive the earlier will. The case of *Marsh* v. *Marsh*[28] is equally unsatisfactory. There the testator, having a will dated 1835, made another in 1850 which was not only inconsistent with the former one but also contained an express clause of revocation. The 1850 will was subsequently destroyed, the testator at that time remarking that he wanted the first one to be his will. The court first gave indication that it regarded a will as an ambulatory instrument whether it contained an express clause of revocation or not, hence leaned in the direction of common-law views, but then observed that there was clear evidence of intention to revive, following ecclesiastical doctrines, at the time of the destruction of the later instrument. As the court expressly disavowed that it had any intention of entering the controversy between the two sets of

[26] In re Wolfe's Will, 185 N. C. 563, 117 S. E. 804 (1923). The first will contained merely a devise of land; the second, lacking both a revocatory and a residuary clause, disposed of "all my effects." It was held to be error to reject the former will merely because the later one had already been probated, and that there was no inconsistency between a will devising land and another one bequeathing personal property.

[27] 34 N. C. 355 (1851).

[28] 48 N. C. (3 Jones L.) 77, 64 Am. Dec. 598 (1855).

principles, it can only be said that the question still remains an open one in that jurisdiction except that, if ecclesiastical views ultimately prevail, parol declarations showing an intent to revive may be sufficient for that purpose.

Statutory provisions in North Dakota, as complete as those found in most states, not only specify the manner of revocation[29] but also stipulate that two or more wills shall be probated together if the later ones do not contain express language on the point.[30] The state has also adopted the typical provision relating to revival.[31] None of these sections have received judicial interpretation to date but the revival provision contains the ambiguity already noted over the point as to how the testator is to evidence his intention to revive "by the terms" of the revocation of the later will. It also provides no explanation or definition of the "due republication" which is to serve as an alternative method of revival. For that reason, it cannot be said that the law of North Dakota is either settled or complete.

At quite an early date it became necessary for an Ohio court to decide whether or not it was possible for a testator, having a valid written will disposing of his entire estate, to revoke the same by a subsequent nuncupative will. When denying that right, the court in the case of *Devisees of McCune* v. *House and Litch*[32] voiced a sentiment which has been echoed in Anglo-American law many times. It said:

There are very good reasons why an individual, he who has

[29] N. D. Rev. Code 1943, Vol. 5, Ch. 56-04, § 56-041, reads: "Except as is otherwise provided in this chapter, a written will, in whole or in part, can be revoked or altered only: (1) By a written will or other writing of the testator, declaring such revocation or alteration and executed with the same formalities with which a will should be executed by such testator . . ."

[30] Ibid., § 56-0405, states: "A prior will is not revoked by a subsequent will unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will, but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

[31] Ibid., § 56-0408, declares: "If, after making a will, the testator duly makes and executes a subsequent will, the destruction, canceling or revocation of the latter does not revive the former unless it appears by the terms of such revocation that it was the testator's intention to revive the former will, or unless after such destruction, canceling, or revocation he duly republishes the prior will."

[32] 8 Ohio 144 (1837).

> not yet executed a written will, should be permitted, under peculiar circumstances, to make a verbal one. But when he has already executed a written will with all the solemnities of the law, there are equally strong reasons why the revocation of it should be attended with the same solemnities.[33]

The force of that decision became evident when Ohio adopted its statute, for the enactment requires that revocation take the form of some later will or codicil or else some other writing subscribed and attested in the manner necessary for the making of a will in the first instance.[34] The later will apparently need not expressly declare the revocation, but if it does not it can serve as a revoking instrument only to the extent that inconsistency can be proven.[35]

The Ohio law also includes a typical revival provision to the effect that the destruction of a "second will" shall not, *ipso facto,* operate to revive the earlier one.[36] While no case has arisen there in which the testator made a complete revoking "will," the Ohio courts have had occasion to pass on the effectiveness of attempts at revival. The nisi prius court concerned in the case of *In re Will of Charlotte Murray*[37] indicated that a defective codicil which

[33] 8 Ohio 144 at 146.

[34] Page, Ohio Gen. Code Ann., Vol. 7, Ch. 4, § 10504-47, declares: "A will shall be revoked by the testator . . . by some other will or codicil, in writing, executed as prescribed by this title, or by some other writing, signed, attested and subscribed, in the manner provided by this title for the making of a will . . ."

[35] In Paully v. Crooks, 41 Ohio App. 1, 179 N. E. 364 (1931), it was held error to instruct a jury that the mere fact of making a second will, which was not produced and was presumably destroyed, necessarily revoked the earlier one, but it was said that it would do so if it contained an express clause or inconsistent provisions. See also Westfall v. Notman, 18 Ohio L. A. 407 (1934), where an express clause of revocation had been present in the subsequent will, and Hennessy v. Volz, 59 Ohio App. 1, 16 N. E. (2d) 1019 (1938).

[36] Page, Ohio Gen. Code Ann., Vol. 7, Ch. 4, § 10504-54, states: "After making a will, if the testator duly makes and executes a second will, the destruction, cancellation or revocation of the second will, shall not revive the first will unless the terms of such revocation show that it was his intention to revive and give effect to his first will; or, after such destruction, cancellation or revocation, he duly republishes his first will."

[37] 20 Ohio N. P. (N. S.) 305 (1917). In that case, the testatrix had made a will in 1905 covering her entire estate and including a residuary clause. It was claimed that she made another in 1911 but it could not be produced and its contents were unknown. In 1912, she was adjudged incompetent and a guardian was appointed. Sometime in 1915, while still under guardianship, she wrote, on the back of the 1905 will, a statement reading: "It is my wish that my mother's share shall go to my sister . . ." This legend was signed but unwitnessed. It was apparently designed to revoke a provision for a deceased legatee and to make a substitution.

could not operate because not validly witnessed might, nevertheless, when coupled with the preservation of the allegedly revoked will, serve "in a certain sense" as a republication thereof. The Ohio Supreme Court, however, in *Collins* v. *Collins,*[38] following views expressed in New York,[39] refused to accept oral statements made by the testator at the time he destroyed the revoking instrument, there a codicil specifically revoking certain of the provisions in the former will, as being sufficient to revive the revoked will. The court indicated that where the revoking instrument is physically destroyed there must be an act of republication. That ceremony, the court said, would require that the testator first acknowledge the will as his last will; that if he does so in the presence of the original attesting witnesses nothing more is necessary; but that if the acknowledgment is made in the presence of strangers to the will they must sign as witnesses although no further signing by the testator is required.[40] Such methods are admittedly desirable safety factors but they utterly disregard the legislative direction that the "terms of the revocation" may serve to "show that it was his intention to revive and give effect to his first will," so that republication becomes the only available method, instead of an alternative method, in that state.

Statutory provisions in Oklahoma are reasonably complete since they deal not only with revocation[41] and revocation by impli-

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Testatrix was declared competent in 1916 but died shortly thereafter without taking further action. Held: even in the 1911 will had been made and supposing it did revoke the 1905 will, the legend written in 1915, inadequate as a codicil, revived the 1905 will.

[38] 110 Ohio St. 105, 143 N. E. 561, 38 A. L. R. 230 (1924).

[39] See In re Stickney's Will, 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246 (1899).

[40] See also In re Paulus, 27 Ohio Op. 283 (1943).

[41] Okla. Stats. Ann. (Perm. Ed.), Tit. 84, Ch. 2, § 101, states: "Except in cases in this article mentioned no written will, nor any part thereof, can be revoked or altered otherwise than: (1) By a written will or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator . . ."

cation[42] but also with the subject of revival.[43] The law of that state has been complicated, however, by the presence therein of the Indian wards of the federal government whose ability to arrange for testamentary disposition of their estates is subject to both state and federal law. As applied to citizens, it has been held that the statute concerning express revocation is not satisfied if the subsequent will is defectively executed so as not be admissible to probate;[44] but that, if a valid revocatory will has been made, the eventual fate thereof is unimportant and its mere destruction does not revive the earlier one.[45] The case of *In re Bourassa's Estate*[46] also illustrates the extent to which the inconsistency may proceed before revocation by implication will occur. There the two wills were identical in every respect except for an omission of the name of a deceased legatee who had been mentioned in the first but not in the second will. It was held that the later will controlled. No elaboration on the revival provision has, as yet, been provided so problems growing from the ambiguous phrasing thereof must await answer at some other time.

The principal difficulty attendant upon wills made by Indian wards has been experienced on the point as to whether or not the subsequent revoking will must be valid enough to warrant its probate or can operate as a revocatory instrument if it complies with state law even though it be deficient in federal requirements.

[42] Ibid., § 105, specifies: "A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

[43] Ibid., § 106, declares: "If, after making a will, the testator duly makes and executes a subsequent will, the destruction, canceling or revocation of the latter does not revive the former, unless it appears by the terms of such revocation that it was his intention to renew the former will, or unless after such destruction, canceling or revocation, he republishes the prior will."

[44] Leard v. Askew, 28 Okla. 300, 114 P. 251, Ann. Cas. 1912D 234 (1911).

[45] Puckett v. Brittain, 152 Okla. 184, 3 P. (2d) 876 (1931). Contest against the earlier will, based on fact that a later will contained an express clause of revocation, was attempted to be supported by secondary proof of the attesting witnesses as to the contents thereof, the original not being found. It was held to be error to exclude the proffered testimony.

[46] 171 Okla. 64, 41 P. (2d) 851 (1935).

In *Chestnut* v. *Capey*,[47] when the nephew of a Choctaw Indian sought letters of administration on his uncle's estate, two different wills were offered in opposition to his request. One of them, dated in 1912, ran in favor of one March and one Woodruff. The other, made in 1908, purported to disinherit the testator's widow and devised the estate to one Chestnut. The widow then produced a third document, made in 1913, entitled "Revocation of Will," which expressly referred to the March-Woodruff will but also extended to "any and all other wills at any time heretofore executed by me." That document, although signed by the testator, witnessed and even acknowledged before a notary public, did not have the judicial approval required by federal law for the making of a will. For that reason, it was urged the revoking instrument had no legal significance but the trial court held otherwise. That action was affirmed on the ground that the federal law dealt only with the making of a will, was silent on the subject of revocation, left the state law free to operate, and the instrument was clearly a "writing of the testator, declaring such revocation" executed with all the formalities required by state law. Again, in *Phillips* v. *Smith*,[48] a will dated in 1932 and containing an express clause of revocation was propounded for probate. One Phillips produced an earlier will in his favor which he claimed should be admitted because the later will purported to disinherit testator's minor son but was lacking in the prior judicial approval made necessary for its validity. The Phillips will was rejected as having been effectively revoked and that action was affirmed, the court expressing the view that compliance with federal law was unnecessary insofar as revocation was concerned.[49] A federal court has reached much the same result, in *Berry* v. *Brokeshoulder*,[50] although the specific

[47] 45 Okla. 754, 146 P. 589 (1915).

[48] 186 Okla. 636, 100 P. (2d) 249 (1940). Riley, J., dissented on the ground that, unless the second will is an effective dispositive instrument at least in some respect, it cannot serve to revoke the earlier will for he considered it impossible to strip the clause of revocation from the invalid will and make it stand alone.

[49] The court also admitted the later will for the reason that the federal law did not control admission to probate but might affect the validity of the devises contained in the will only so far as they related to allotted lands.

[50] 162 F. (2d) 651 (1947).

issue there involved was whether judicial approval was necessary for an Indian's will which disinherited grandchildren, the testator not having any closer objects of his bounty and the statute merely applying to wills disinheriting the "parent, wife, spouse or children."

It has already been noted that Oregon is the only state in the union which has no statute whatever on the subject of revocation[51] although it does possess one relating to revival.[52] One interesting case, that in *In re Engle's Estate*,[53] has thrown considerable light on the meaning thereof. It appeared therein that the testator, pursuant to an agreement to devise in return for lifetime support, had made a will in 1921 which was offered for probate upon his death. Contest was based on the fact that later in the same year he had made another will, not produced but presumed destroyed, containing an express clause of revocation. The devisee offered to show that, in 1928, testator had duly executed a codicil referring to the first will, declaring it to be his last will and directing that any contesting legatee should forfeit his legacy. This codicil likewise could not be found. It was held proper to admit the first will to probate on the ground that a will made pursuant to a valid contract could not be affected by a subsequent revoking will or instrument, but that if it could be,[54] the proof of the execution of the codicil showed an intention to revive sufficient to keep the first will alive. To the argument that the revival provision in the statute required the re-execution of the revoked will, the court replied that the execution of a codicil was sufficient for the purpose

[51] See 25 CHICAGO-KENT LAW REVIEW 199-200.

[52] Ore. Comp. Laws Ann. 1940, Vol. 2, Tit. 18, Ch. 3, § 18-304, states: "If after making any will the testator shall duly make and execute a second will, the destruction, canceling, or revocation of such second will shall not revive the first will, unless it appears by the terms of such revocation that it was his intention to revive and give effect to the first will, or unless he shall duly republish his first will."

[53] 129 Ore. 77, 276 P. 270 (1929).

[54] The court, at 129 Ore. 77 at 84, 276 P. 270 at 272, did state: "We do not hold *under the facts of this case*, that such will was ever legally revoked." Italics added. The language used might support an inference that, but for the agreement, the court was of the opinion that the mere execution of the revoking will would have been enough to produce an instant revocation of the former one.

but that the statute merely required republication which was "the act of declaring or making known to the witnesses that the testator understands and intends the instrument subscribed by him to be his last will and testament."[55] The court did not clarify this statement by way of dictum nor did it elaborate on whether the "witnesses" referred to were to be the original ones who had attested the will at the time of its execution or were merely to be persons in whose presence the "act of declaring or making known" took place. It must be said, therefore, that there are still doubtful points which may provoke even more litigation.

Pennsylvania has earned the dubious honor of being the state in which most demand has been made on the courts to supply answers to the manifold problems connected with this subject. It possesses two provisions on the point of revocation, one relating to wills[56] and the other to testaments,[57] but has none on revival, so not a little of the difficulty has sprung up over the later point. There is ample evidence, however, that the courts of Pennsylvania have not always agreed on issues of revocation and have, thereby, added to the confusion.

The earliest Pennsylvania case, that of *Lawson* v. *Morrison*,[58] would indicate that common-law principles were, at one time, acceptable in that state for the court described a will containing a clause of revocation as being merely ambulatory until testator's

[55] 129 Ore. 77 at 84, 276 P. 270 at 272.

[56] Purdon's Pa. Stats. Ann., Tit. 20, Ch. 2, § 271, declares: "No will in writing, concerning any real estate, shall be repealed, nor shall any devise or directions therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the manner hereinbefore provided . . ."

[57] Ibid., § 272, specifies: "No will in writing, concerning any personal estate, shall be repealed, nor shall any bequest or direction therein be altered, otherwise than as hereinbefore provided in the case of real estate, except by a nuncupative will . . ."

[58] 2 Dall. 286, 1 L. Ed. 384, 1 Am. Dec. 288 (Pa., 1792). Four individual wills had been made but only three, dated 1775, 1777 and 1779 respectively were important. The 1777 will had been destroyed when the 1779 will was made and its contents could not be proven. It was equally doubtful if the 1779 will had a clause of revocation or was inconsistent with the one made in 1775, but the court said that, whatever it contained, it was ambulatory so any clause therein could not take effect until the will did, and it never did because it was destroyed. The court added that even if it be held that the revocation took effect immediately the cancellation operated to revive the prior will which had been revoked but not destroyed.

death so that, if destroyed before then, an earlier will left uncancelled had to be admitted to probate. That view did not survive for long as the court soon began to talk about the necessity for revival after it had once been determined that the earlier will had been revoked, from which point it was led into a consideration of what would produce a revocation and at what point of time. Presence of an express clause in the later will would clearly evidence an intention to revoke in a fashion compatible with statutory requirements[59] but, although there was much dicta spoken, it was not until 1930, in the case of *In re Ford's Estate*,[60] that the court squarely decided that such express revocation operated immediately upon execution. Of course, the revocatory will had to be a valid one, so if it was obtained by undue influence then, according to *Rudy* v. *Ulrick*,[61] it failed to produce a revocation either as a will or as a separate "other writing." It is not necessary, however, that the subsequent revocatory will provide an effective scheme of distribution if it is otherwise validly executed. Thus, in *Price* v. *Maxwell*,[62] an earlier will made in 1841 was followed by another executed in 1856, containing a clause of revocation, giving the estate to charity but which devise failed because the testator did not live for a sufficient period of time after making

[59] See Boudinot v. Bradford, 2 Dall. 266, 1 L. Ed. 376 (Pa., 1796); Havard v. Davis, 2 Binn. 406 (Pa., 1810); Price v. Maxwell, 28 Pa. St. 23 (1857); Rudy v. Ulrich, 69 Pa. 177 (1871); In re Ford's Estate, 301 Pa. St. 183, 151 A. 789 (1930), noted in 26 Ill. L. Rev. 352; In re Shetter's Estate, 303 Pa. St. 193, 154 A. 288 (1931), noted in 80 U. of Pa. L. Rev. 467; In re Will of Stephenson, 19 Phila. 41 (Pa., 1888); and McCartan's Estate, 58 Pitts. L. J. 364 (Pa., 1910), in all of which cases the subsequent wills contained express clauses, so the courts involved felt impelled to take up questions of revival.

[60] 301 Pa. St. 183, 151 A. 789 (1930), noted in 26 Ill. L. Rev. 352.

[61] 69 Pa. 177 (1871). A will dated in 1865 was offered for probate but contest thereto was addressed to the fact that a subsequent will, made in 1869, contained a revoking clause. Probate of the latter will had already been denied because it had been obtained through undue influence. It was held error for the trial judge to instruct the jury that the second will might be treated as void in part but valid in other respects. The court also intimated that if a testator revokes one will and sets down another scheme of distribution, that fact shows he does not intend to die intestate so that he could never have intended the revoking clause to operate if the new scheme of distribution fails.

[62] 28 Pa. St. 23 (1857). See also In re Melville's Estate, 245 Pa. St. 318, 91 A. 679 (1914), where a codicil purported to abrogate the residuary clause of the earlier will and instead gave the balance of the estate to charity, but was inoperative because made within thirty days of testator's death. Held: the residue passed as intestate estate, the revocatory language of the codicil operating immediately upon execution.

the second will. The court held, in the light of a statute directing that a void devise to charity should go to residuary legatee or to the heirs at law, that the inoperative devise could not be distributed under the first will as that document had been totally revoked.

It is often a difficult task to establish that a subsequent will containing a clause of revocation did, at least at one time, exist, particularly if it has been destroyed. The Pennsylvania statute does not state that the subsequent will, codicil or other writing must be offered and accepted for probate, but there is intimation in the case of *In re Harrison's Estate,*[63] that such must be the case. The subsequent will there concerned had presumably been destroyed and only one witness offered to testify as to its contents, that witness being the contestant herself. The court held that her testimony alone was insufficient to establish the same as a will so could find no revocation. It was then argued that the document could serve as some "other writing" declaring the revocation, but the court pointed out that the statute not only required that the same would have to be duly executed but would also have to be "proved in the manner hereinbefore provided," to-wit: by the testimony of two witnesses and that, for this purpose, the revocatory "other writing" would have to be produced.[64] That decision was implemented shortly thereafter by the case of *In re Koehler's Estate*[65] where the revoking will could not be found and the court refused to accept oral testimony as to its contents, even to rebut probate of the earlier will, on the ground that a will could not be revoked by oral testimony. It would seem that there is a vast difference between attempting to revoke an existing will by oral declarations, clearly forbidden by statute, and using oral testimony to establish that there had been, at one time, a written

[63] 316 Pa. St. 15, 173 A. 407 (1934), noted in 29 Ill. L. Rev. 1092. Compare with dissent by Moschzisker, C. J., in the case of In re Ford's Estate, 301 Pa. St. 183, 151 A. 789 (1930), noted in 26 Ill. L. Rev. 352.

[64] But see dissent by Linn, J., 316 Pa. St. 15 at 21, 173 A. 407 at 410, to the effect that, since a lost will may be established by parol evidence, it would be illogical to hold that a lost revoking instrument could not be.

[65] 316 Pa. St. 321, 175 A. 424 (1934).

revocation thereof. Other states have held oral proof as to the latter to be sufficient,[66] but the explanation may rest in the fact that the revocation statutes there found merely require due execution of the revocatory instrument and say nothing as to whether it must be "proved in the manner hereinbefore provided," as is the case in Pennsylvania. Whatever the rationale, the method there imposed obviates the possibility of perjured testimony being offered to nullify a will which still remains in sound physical existence at the time of testator's death.[67]

To this point, the Pennsylvania cases discussed involved the problem of express revocation. While the statute does not mention the possibility of implied revocation, two cases have passed on the question and have produced the result that if inconsistency is shown to exist the earlier will is immediately nullified. The nisi prius court concerned in *Stauffer* v. *Burkholder*,[68] finding that the later will made an entirely different disposition of the estate and that a codicil thereto also substituted a different executor for the one originally named, merely held that a republication of the earlier will was necessary to revive it. In the case of *In re Burtt's Estate*,[69] however, the court expressly declared that it could see no reason for any difference between the operation of an express revocatory will and one that is merely inconsistent, both being ways by which the testator may evidence his intention to revoke, so that, in either instance proper revival of the earlier will would be necessary if the same was to renew its effect. Even so, it has been recognized that the later inconsistent will may be made to depend upon the happening of designated future events and, being so, any revocation to be produced by reason of the inconsistency must await the outcome of the contingency. Thus,

[66] See, for example, In re Johnston's Estate, 188 Cal. 336, 206 P. 628 (1922), and In re Wear's Will, 131 App. Div. 875, 116 N. Y. S. 304 (1909), and the statutes of those states.

[67] But see Appeal of Deaves, 140 Pa. 242, 21 A. 395 (1891), where efforts to establish a lost will were defeated on the ground that the testator, during his lifetime, was aware that the will had been lost and under the circumstances it was assumed that he intended to revoke it.

[68] 2 Lac. L. Rev. 105 (Pa., 1885).

[69] 353 Pa. St. 217, 44 A. (2d) 670 (1945).

in the case of *Hamilton's Estate,*[70] a will dated in 1871 was followed by another made in January, 1873, to which was affixed a codicil to the effect that the earlier will should be testator's last will if he should die before March 1, 1873, otherwise the second will was to become operative. As testator died prior to the designated date, the later inconsistent will never became effective, hence possessed no revocatory effect.[71]

As soon as the Pennsylvania courts admitted that a will could be revoked, they were immediately beset by problems of revival and forced to choose whether to apply a presumption in favor of revival, based on the survival of the earlier will and the destruction of the revocatory one, or to seek elsewhere for evidence of an intention to revive. In the first of such cases, that of *Boudinot* v. *Bradford,*[72] the court chose to endorse the former of these views although they found the presumption rebutted by declarations made by the testator to the effect that he wished to die intestate.[73] Since then, at least two cases justify revival solely on the score of preservation of the revoked will and destruction of the revocatory one,[74] although in other cases there has been extraneous evidence of an intention one way or the other. In the case of *In re Will of Stephenson,*[75] for example, testator's original will favored his wife but he had drawn up another to get some peace from the importunities of his relatives. The second will expressly revoked the first, but testator refused to destroy the first and, a few days

[70] 74 Pa. St. 69 (1873).

[71] The court also said the same view would have been taken even if the second will had contained an express clause.

[72] 2 Dall. 266, 1 L. Ed. 376 (Pa., 1796).

[73] It was objected that to permit evidence of oral declarations would be to allow the use of parol evidence to revoke a will. The court held the declarations admissible to show absence of intent to revive that which had already been expressly revoked.

[74] See the case of McCartan's Estate, 58 Pitts. L. J. 364 (Pa., 1910), where the revoking will had been physically destroyed but the fragments thereof had been preserved in the same envelope as the earlier will and, when pieced together, disclosed the presence of an express clause, and the case of Wulff's Estate, 26 Pa. Dist. Rep. 144 (1916), where the court said: "The cases hold that the revocation of a later will of itself revives and restores an earlier one preserved by the testator, and leaves it with the same effect as if the latter had never existed . . ."

[75] 19 Phila. 41 (Pa., 1888).

later, he sent for the second, tore it up, handed the first will to his wife, at that time saying: "Sarah . . . I want you to keep the first will." It was held to have been adequately revived.[76] On the other hand, contemporaneous oral declarations by testator made at the time of the destruction of the revoking will have been received to show that there was no intention to revive the former will. Thus, in the case of *Manning's Estate,*[77] testatrix possessed two wills of inconsistent character, one dated in 1905 and the other in 1909. On the day prior to her death, her husband testified, she handed him the first of these wills and said that it was her will. The maid testified that, at an hour subsequent thereto, the testatrix handed the second of the wills to her with directions to burn the same, saying she was going to make a new will. It was contended that the statements to the husband republished the first will, but the court held that the alleged republication made before the destruction of the revoking instrument was ineffective[78] and that the statements made to the servant at the moment of the destruction of the revoking will negatived any thought of revival.[79] If oral statements are to possess any effect, according to *Flintham* v. *Bradford,*[80] they must be spoken contemporaneously with the transaction of cancelling the revocatory will, for it is at that moment the presumption of revival operates to restore life. If, therefore, the will is revived because the contrary is not indicated, oral declarations made at a subsequent time indicative of a purpose not to revive can have no legal effect since their only operation would be to revoke an existing will and this cannot be done

[76] See also In re Kerchner's Estate, 41 Pa. Super. 112 (1909), where the revocatory will was burned, the testatrix then saying: "The other last will shall count." The court said these statements amounted to a republishing of the will and that oral republication was sufficient. The language tends to cast discredit on the earlier view that no republication would be necessary and revival could be inferred from the mere fact that the older will had been preserved.

[77] 46 Pa. Super. 607 (1911).

[78] The court also seemed to be of the opinion that republication would have to take place in the presence of two witnesses. It is the only Pennsylvania case so intimating.

[79] Accord: In re Ford's Estate, 301 Pa. St. 183, 151 A. 789 (1930), noted in 26 Ill. L. Rev. 352.

[80] 10 Pa. 82 (1848).

by parol.[81] Although Pennsylvania has no revival statute, these decisions may have some bearing upon the meaning which should be given to statutory language indicating that it should appear "by the terms of such revocation that it was his intention to revive and give effect to his first will." They should, at least, possess persuasive authority on the point.

Revival may, of course, be produced by other methods, and two other Pennsylvania cases are significant for that reason. In the case of *In re Shetter's Estate*[82] the testator had made a will in 1917 but there was oral testimony that he had followed it with another, made in 1923, containing an express clause of revocation. Along with the 1917 will was a codicil executed in 1924, made at the time of the destruction of the second will, purporting to republish the earlier will, but it was witnessed by interested persons. The claim was made that inasmuch as the codicil was attested in a defective manner it could not serve to republish and revive the former will but the court held to the contrary, saying that as the original will was validly executed the republication was sufficient despite the defect. The decision can be supported by applying the presumption that the mere destruction of the revocatory will was enough to revive the earlier one and the codicil merely served as confirmatory evidence of intention to revive of no less weight than would be possessed by a contemporaneous oral declaration of the testator. Its validity would be shaken, however, if Pennsylvania had a revival statute requiring re-execution. In the other case, that of *Havard* v. *Davis*,[83] the testator made two wills, one in August and the other in September of 1806. The second contained an express clause of revocation. Thereafter, the testator made oral statements to the effect that he wanted the August will

[81] See also the case of Holmes' Estate, 240 Pa. St. 537, 87 A. 778 (1913), where contest of a will made in 1908 was based on the ground that a will dated in 1888 had been republished by oral statements to the effect that testator did not like the second will and wanted the first to become effective. There was no act of cancelling the 1908 will at the time the statement was made, if made at all. The court declined to rule on the sufficiency of the republication for lack of satisfactory proof that the parol declaration was ever made.

[82] 303 Pa. St. 193, 154 A. 288 (1931), noted in 80 U. of Pa. L. Rev. 467.

[83] 2 Binn. 406 (Pa., 1810).

to stand as his last will and it was claimed that, by so doing, he had republished the first will and thereby revoked the second because of the inconsistency between them. The statute then, as now, required that a will could not be revoked except by some other writing adequately executed. If the first will was revived, it met all statutory tests. The court held that the first will could be republished by parol declarations and, even though it had been lost in the meantime, it could be established by secondary evidence as to its contents. Upon such proof, it would be admitted to probate for it then would show that it had been "executed and proved" in the manner made necessary by statute. This rather curious boot-strap process of nullifying a written will by mere parol evidence would have been prevented if the obvious legislative intention that a will should be revoked by some later writing had been observed. It is true that the word "later" does not appear either in the original Statute of Frauds or any of its American counterparts, but in terms of cause and effect those statutes should be so construed. Such would be the operation if a codicil were used to revive the earlier will for the codicil has the peculiar merit of making the will of which it is a part speak anew as of the date of its execution, *i.e.* posterior to the revocatory will which it seeks to nullify. The same thing would also be true if a later "other writing" were used. But to produce the result obtained in this case in the anomalous fashion there found possible suggests the importance of careful revision of statutory language to safeguard against the dangers of parol evidence.

The Rhode Island statute on revocation follows the general purport of the Statute of Frauds[84] but says nothing about revival. Any seeming deficiency is overcome, however, so long as the decision in *Bates* v. *Hacking*[85] stands for the holding therein places

[84] R. I. Gen. Laws 1938, Ch. 566, § 17, states: "No will or codicil or any part thereof shall be revoked otherwise than . . . by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed . . ."

[85] 28 R. I. 523 (1907), affirmed in 29 R. I. 1, 68 A. 622, 125 Am. St. Rep. 759, 14 L. R. A. (N. S.) 937 (1908).

that state squarely behind common-law principles in every respect. The testator there had made four different wills but only the last two were of importance. The latest one had contained an express clause of revocation but had afterwards been physically destroyed. The third will, which remained in existence, was offered for probate but the trial court instructed the jury that, as it had been revoked, it was necessary to find an intention to revive before it could be probated. That instruction was held to be erroneous because all wills were to be regarded as ambulatory and could possess no significance merely from the fact of execution. Necessarily, then, the revoking will had to survive the testator before it could operate and, as it had not, the earlier will had never been revoked so any discussion of revival was purely beside the point. On rehearing, the court deplored the confusion produced elsewhere by attempting to distinguish between wills containing express clauses and those which produce revocation by implication. Where that distinction is observed, said the court, it is because the express clause is felt to be something separate from the will in which it is contained and capable of operating at a different time, but such a thought was deemed illogical because the clause depends on the execution and attestation of the will itself to give it any validity and, if lifted from the will, would not comply with statutory requirements essential to its existence even as some "other writing." The argument was weakened somewhat by the admission, albeit in the form of dictum, that if a separate writing had been used it would have operated immediately upon execution. Any discussion of revival problems must, then, await the time when some testator does use a separate writing, which he subsequently destroys, but retains the original will intact. The court will then have to establish its own standards concerning methods to be pursued to revive the revoked will or else retreat in the face of its own dictum.

South Carolina also presents the picture of being a state which has consistently followed the common law pattern under a statute

which merely specifies the methods permissible for revocation.[86] In a very early case, that of *Legare* v. *Ashe*,[87] a mother had made one will in favor of her daughter but, having acquired additional property, she applied to her counsel to draft a second will also favoring the child. This will was duly executed. Still not content, she had counsel draw a third will making even better provision for the daughter and this was properly attended to. Upon the testatrix's death, only the first and second wills could be found. It was supposed that the third will had been left at the lawyer's office, but after full search he could not find it. There was no reason to believe that the testatrix had cancelled the will but rather strong evidence that she was satisfied with its contents and had every intention that it should be carried out. Upon oral evidence given by the lawyer and two of his students who had witnessed the third will, the jury found in favor of its proponents as a lost will and declared that it contained provisions revoking the earlier ones. A decree was later entered according to the verdict, the last uncancelled expression of testamentary intention being held to control. Similarly, in *Taylor* v. *Taylor*,[88] although testator's first will had been followed by a later one revoking it, but which second will had been intentionally destroyed, the court allowed probate of the first will on the ground that the revocatory will possessed only an ambulatory effect and lost its significance by its destruction. That decision was followed and applied over one hundred years later when the question next arose in the case of *Kollock* v. *Williams*,[89] and there was no evidence of any desire to change from common law rules. Other problems have not yet developed in that state, hence it is impossible to do more than hazard a guess as to their probable solution but the tenacity dis-

[86] S. C. Code 1942, Vol. 4, Ch. 175, § 8921, declares: "No will or testament, in writing, of any real or personal property or any clause thereof, shall be revocable but by some other will or codicil in writing, or other writing declaring the same, attested and subscribed by three witnesses as aforesaid, or by destroying . . ."

[87] 1 S. C. L. (1 Bay) 464 (1795).

[88] 2 Nott & McCord 482 (S. C., 1820).

[89] 131 S. C. 352, 127 S. E. 444 (1925).

played in adhering to common law concepts may indicate that there is little likelihood of ecclesiastical views finding acceptance.

The statute law of South Dakota, in common with several adjoining states, speaks as to revocation,[90] revocation by implication,[91] and also as to revival.[92] One decision, incidentally the only one, elaborating on the statute is to be found in the case of *In re Bell's Estate.*[93] There, a husband propounded a will, made in his favor in 1892, but was met with a contest by a nephew who claimed that a later will, containing an express clause of revocation, had been made giving only one-half of the estate to the husband and the other half to the nephew and niece equally. That will could not be found but oral evidence was received as to its contents and due execution. There was no effort made to probate it as a lost will, but on the strength of the testimony the 1892 will was rejected. It was urged, on appeal, that the evidence of the witnesses was uncertain as to the date of the alleged revoking will, that it had in fact been made earlier than the one in 1892, and the proof of its contents was insufficient so a new trial should be awarded. The holding was, however, affirmed on the ground that the proof did not warrant a new trial. There was no discussion of the legal problems involved so the case might stand for the view that a revocatory will operates instantly upon execution[94], or at

[90] S. Dak. Code 1939, Vol. 3, Tit. 56, Ch. 56.02, § 56.0217, recites: "Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered, otherwise than: (1) By a written will or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator . . ."

[91] Ibid., § 56.0221, specifies: "A prior will is not revoked by a subsequent will unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will, but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

[92] Ibid., § 56.0222, declares: "If after making a will, the testator duly makes and executes a subsequent will, the destruction, canceling or revocation of the latter does not revive the former unless it appears by the terms of such revocation that it was his intention to revive the former will, or unless after such destruction, canceling, or revocation he duly republishes the prior will."

[93] 13 S. Dak. 475, 83 N. W. 566 (1900).

[94] That presumption is strengthened by the language of the statute quoted above at note 91, which, by obverse reasoning, would indicate that a prior will is revoked if the subsequent will does contain an express revocation. The conclusion is further strengthened by Section 56.0222 forbidding revival merely by reason of the destruction of the subsequent will. That statute would be unnecessary if common-law principles controlled.

least, that it need not be probated to serve as a nullifying instrument. What the action would have been if the second will had been shown to have been intentionally destroyed, or what would have been necessary to show a revival of the earlier will, were questions which were properly left unanswered since not before the court. They are matters, however, which can well serve to plague litigants in that state.

It has already been noted that the Tennessee statute on revocation is unusual for, on the surface, it forbids the revocation or alteration of a written will merely by a subsequent nuncupative will unless the same is duly validated,[95] and says nothing about other possible methods or about the revival of revoked wills. It has been decided, however, that other methods do exist as, for example, the mistaken destruction of another document under the belief it is the will intended to be revoked,[96] by writing a signed memorandum on the will that it is "null and void,"[97] or by making alterations in a testament concerning personalty which does not come within statutory comprehension.[98] Mere parol declarations that the testator does not desire the will to stand have, on the other hand, been treated as insufficient in view of the solemnity required for the execution of a will devising land.[99] If inconsistency is to be relied on, there must be ample evidence of that fact, according to

[95] Williams Tenn. Code Ann. 1934, Vol. 5, Tit. 3, Ch. 1, § 8097, states: "No written will shall be revoked or altered by a subsequent nuncupative will, except the same be in the lifetime of the testator reduced to writing and read over to him and approved; and unless the same be proved to have been so done by the oaths of two witnesses at least, who shall be such as are admissible in trials at common law." See Woodward v. Woodward, 37 Tenn. (5 Sneed) 49 (1857), to the effect that a nuncupative will which does not measure up to the statute cannot serve to revoke a written will.

[96] Smiley v. Gambill, 39 Tenn. (2 Head) 163 (1858).

[97] Billington v. Jones, 108 Tenn. 234, 66 S. W. 1127, 56 L. R. A. 654 (1901). Testator there had made a written will but, on the importunities of his wife who thought it unduly favored certain of the children, he appended the signed memorandum. It was held that the fact that he had preserved the document intact for sixteen years did not obviate the revocation by cancellation.

[98] Greer and Wife v. Mc'Crackin, 7 Tenn. (Peck) 301, 14 Am. Dec. 755 (1824).

[99] Allen v. Huff, 9 Tenn. (1 Yerg.) 404 (1830). The court expressed itself as believing that an instrument of equal dignity would be required if the will was not subjected to physical destruction. See also Grimes v. Nashville Trust Co., 176 Tenn. 366, 141 S. W. (2d) 890 (1940), to the effect that declarations of an intent to die intestate, but not manifested by acts recognized by law, are insufficient.

Hickey v. *Beeler*,[1] for if the alleged second will has presumably been destroyed and there is inadequate evidence as to its contents the first will must stand as being unrevoked. In such a case, oral declarations by the maker indicating a desire to have the property distributed in a different manner than that indicated by the earlier will must be deemed inadmissible.

Revocation being possible, Tennessee courts have been forced to consider problems as to revival. In *McClure* v. *McClure*,[2] although the main question was one of undue influence, the court also passed on certain instructions which had been given to the jury by the trial court. It approved one declaring that a will is revoked by a subsequent will whether the latter expressly so states or is merely inconsistent with the earlier will. It also at least tacitly approved another to the effect that destruction of the revoking will operated to revive the earlier will, by indicating that destroying one and retaining the other presumably amounted to a "republication" thereof. It did find error in refusing to instruct that the jury should consider evidence tending to disclose that, at the time of the destruction of the second will, testator intended to make a third one, as revival was said to depend "upon the facts and circumstances of each particular case." Doubt may have been cast on that decision by the more recent holding of the Tennessee Court of Appeals in the case of *Ewell* v. *Rucker*,[3] which makes no reference to the McClure case and deals with the problem as though it were one of first impression. In that case, testator made three wills, dated 1927, 1938 and 1943 respectively. The second expressly revoked the first, and the third apparently revoked the second but this fact is not made clear. The will of 1927 remained in the custody of testator's sister-in-law until the time of his death when it was offered for probate. The second and third wills were last seen in testator's possession, so presumably

[1] 180 Tenn. 31, 171 S. W. (2d) 277 (1943).

[2] 86 Tenn. 173, 6 S. W. 44 (1887). But see Lunn v. Ealy, 176 Tenn. 374, 141 S. W. (2d) 893 (1940), as to the effect of subsequent oral declarations tending to disclose the absence of intention to revive.

[3] 28 Tenn. App. 156, 187 S. W. (2d) 644 (1945).

had been destroyed. It was claimed that the first will was thereby, *ipso facto,* revived. The court, after commenting upon the confusion existing in the rules as to revival, determined to follow ecclesiastical rules which admit of no presumption either way but make revival depend on the testator's intention. In that regard, the court emphasized the fact that the testator had been advised by his attorney, whether correctly or not, that if he destroyed the second and third wills "his property would go just as if he died intestate." For that reason, it said: "It is unreasonable to conclude that his mind reverted to the plan of the 1927 will. . . An intention to revive must be established."[4] It is possible that the case merely illustrates the sort of "facts and circumstances" referred to in McClure case as being pertinent on the issue of revival, but the emphatic refusal to accept any presumption on the subject leaves the Tennessee testator in a quandry.

While the Texas statute on revocation is substantially similar to those in other states,[5] and lacks any provision on revival, it does contain an unusual clause to the effect that the court, before admitting a will to probate, must be satisfied that the same "has not been revoked by the testator,"[6] the significance of which will shortly be made apparent. Revocation may be accomplished through a subsequent will expressly so declaring[7] or by a codicil designed to have the same effect, but if the latter method is used the language should be clear and unambiguous.[8] Non-statutory methods, however, will be insufficient according to *Ragland* v. *Wagener*[9] where an Oklahoma testator's will was accepted for

[4] 28 Tenn. App. 156 at 165, 187 S. W. (2d) 644 at 648.

[5] Vernon Tex. Civ. Stat. Ann., Vol. 22, Tit. 129, Art. 8285, recites: "No will in writing, made in conformity with the preceding articles, nor any clause thereof or devise therein shall be revoked, except by a subsequent will, codicil or declaration in writing, executed with like formalities . . ."

[6] Ibid., Vol. 9, Tit. 54, Ch. 5, Art. 3348, reads: "Before admitting a will to probate, it must be proved to the satisfaction of the court . . . (5) that such will has not been revoked by the testator."

[7] Hawes v. Nicholas, 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863 (1889).

[8] See Warnken v. Warnken, 104 S. W. (2d) 935 (Tex. Civ. App., 1937); Laborde v. First State Bank & Trust Co., 101 S. W. (2d) 389 (Tex. Civ. App., 1937).

[9] 142 Tex. 651, 180 S. W. (2d) 435, 152 A. L. R. 1232 (1944), reversing 179 S. W. (2d) 380 (Tex. Civ. App., 1944).

ancilliary administration in Texas because certain of the land was located there. A devise of such land was questioned because the will expressed a purpose to execute a deed during testator's lifetime and to place the same in a safety deposit box for delivery to the devisee upon his death, but pointed out that if this was not done the devise should stand revoked. The deed was never executed, so the devisee petitioned the court to nullify the proviso on the devise as being an improper attempt to create a new method of revoking a will or some part thereof. All the courts involved agree that this could not be done, the statute precluding any but the methods named, but the highest court reversed a decree which had annulled the proviso on the ground that the will disclosed only a conditional, rather than an absolute, intention to devise in the first place and the condition not being satisfied the entire devise failed.

Progressing to the question of revival, in the first case in point, that of *Hawes* v. *Nicholas*,[10] the court concluded that a will expressly revoking all former wills operated immediately to produce that revocation and that the mere act of destroying the revoking instrument would not serve to revive the earlier will. Thereafter, in the case of *Dougherty* v. *Holscheider*,[11] the court applied the same rule to a holographic instrument, inconsistent with an earlier formal will, which was made contingent upon the happening of an event which did not take place. There the holographic will was made the day prior to the time the testator submitted to an operation and upon the understanding that it should serve to express his wishes if anything untoward should happen. In fact, he lived for two years more. Even though the holographic instrument was ineffective as a will, the court refused to observe distinctions drawn elsewhere between wills designed to produce an express revocation and those which might accomplish that result because of inconsistency; the former operating immediately and the latter only upon testator's death. As an express clause

[10] 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863 (1899).

[11] 40 Tex. Civ. App. 31, 88 S. W. 1113 (1905).

clearly shows evident intention to revoke and the court felt that a change in the scheme of distribution discloses the same mental condition, it asserted there was no basis for any distinction. That being so, the court said "a republication of the former will would be necessary to give it vitality, no matter whether the later will was destroyed or became inoperative."[12]

The case of *Brackenridge* v. *Roberts & McIntyre*,[13] however, seems to suggest that revival is never possible in Texas. A will made in 1913 was there offered for probate but was contested on the ground that a later instrument contained a revoking clause. That instrument had not been preserved and nothing was known as to its contents except for the presence of the clause of revocation. The upper court declared that if the jury found not only that the instrument had been executed but also that it was executed either with testamentary intention or as evidence of a designed purpose to revoke the earlier will then the latter was necessarily and immediately revoked for to hold otherwise would virtually abrogate the statute on revocation.[14] Continuing further, the court indicated that destruction of the revocatory instrument would not revive the earlier will and that, because of a peculiar provision in the Texas statute which implies that a will once revoked may not be admitted to probate,[15] any application of revival concepts would be ruled out of question. If this case means what it says, any discussion of re-execution or republication as methods of revival to be found in earlier cases is worthless and only a complete redrafting of the earlier will with its attendant new signing and new attestation would be essential to preserve the earlier testamentary scheme. Requirements of that character would be indeed revolu-

[12] 40 Tex. Civ. App. 31 at 38-9, 88 S. W. 1113 at 1117.

[13] 114 Tex. 418, 267 S. W. 244 (1924), reh. den. 270 S. W. 1001 (1925).

[14] That argument presupposes that when the statute says that a will "shall be revoked" by the making of a subsequent will it means "immediately revoked." The word "immediately" is lacking, however, and there is no support to be gained from a revival provision which might strengthen that interpretation for Texas has none. The statement is consistent with earlier precedents, so it is probably now too late to expect that the court will change its mind on the question of the time when revocation, either express or implied, takes place.

[15] See note 6, ante.

tionary, would eliminate all of the confusion produced by the many conflicting views of revival, but the statute hardly seems to be worded with that purpose in mind and is more nearly declaratory of well understood principles, to-wit: that a revoked will which has never been revived is a nullity unworthy of probate. If the statute said that, as a condition to probate, it should appear that the will "had never, at any time, been revoked," one could agree with the views expressed, but it is doubtful if the statute should, or was even intended to, apply to a will which had, at one time, been revoked but had, in some appropriate fashion, been revived.

Absence of judicial decisions in the state of Utah on this subject may indicate that the statutory provisions adopted by that state, dealing with revocation,[16] revocation by implication,[17] and revival,[18] are so clear that there is no room for doubt as to the meaning thereof. It is more likely, however, that the opportunity to provide interpretation has not yet arisen inasmuch as the provisions are identical with those found in other states, California will suffice as an example, and provisions of that character have not escaped judicial consideration elsewhere.

Although the Vermont statute specifies the means to be followed in order to revoke a will,[19] the case of *In re Noye's Will*[20] amply illustrates the difficulty which may lie in the path of a contestant who asserts that the will being offered for probate has

[16] Utah Code Ann. 1943, Vol. 5, Tit. 101, Ch. 1, § 101-1-19, declares: "Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than: (1) By a written will, or other writing of the testator declaring such revocation or alteration executed with the same formalities with which a will should be executed by such testator . . ."

[17] Ibid., § 101-1-22, states: "A prior will is not revoked by a subsequent will, unless the latter contains an express revocation or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

[18] Ibid., § 101-1-23, specifies: "If after making a will the testator duly makes and executes a second will, the revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless after such revocation the first will is duly republished."

[19] Vt. Pub. Laws 1933, Tit. 12, Ch. 117, § 2756, declares: "A will shall not be revoked, except by implication of law, otherwise than by some will, codicil or other writing, executed as provided in case of wills . . ."

[20] 61 Vt. 14, 17 A. 743 (1888).

been nullified by a later will. The contestant there, seeking to prevent probate of a will made in 1881, offered to prove, by a single witness who claimed that he saw a later will dated in 1885, that the later instrument contained an express clause of revocation. The witness was unable to tell the names of the attesting witnesses thereto and was also vague on the point of the general contents thereof. It was held that it would be necessary, in order to establish revocation, to adduce the same type of evidence as would be necessary in a proceeding to prove an ordinary will, and that contestant's case was lacking in that respect. When the revocation takes the form of a codicil which can be produced then, according to the case of *Holley* v. *Larrabee*,[21] the case is much simpler especially if the codicil is express on the point. In that case, the testator had made a will bequeathing the life use of all his property to his wife with remainder in his lands to his son but remainder in his personal effects to his daughters equally. Five years later he added a codicil expressly revoking the devise of the remainder in the land to the son but substituting, in lieu thereof, a provision under which he gave the land "and such part of the personal estate as may remain" to the son if he outlived the testator's wife, but if not, then one-half to the wife in fee and one-half to the son's heirs. The wife died before the testator and the son took possession of all the personal effects upon the testator's death. The executor sued in trespass, but the trial court held for the defendant and that decision was affirmed on the ground that the lack of an express revocation of the provisions relating to personalty did not prevent the codicil from operating as an implied one.

The issue of revival is still somewhat clouded in that state. In *Warner* v. *Warner's Estate*,[22] the testator, who had been a practicing lawyer, made a will in 1857 in favor of his wife. About two years later he appended a memorandum at the foot of the will which stated: "This will is hereby cancelled and annulled." Although that statement was not signed, there also appeared, on the

[21] 28 Vt. 274 (1856).

[22] 37 Vt. 356 (1864).

back of the paper after it was folded, the words "Cancelled and is null and void," followed by testator's signature. There was evidence that, about two days prior to testator's death, he told his wife that she would find his will, made out for her benefit, in a trunk where he kept his papers. Shortly after testator's death, the wife examined the trunk, found the document marked as aforesaid, and offered it for probate. Denial of probate was affirmed on the ground that the memoranda amounted to a cancellation and that the sayings of the testator shortly before his death did not amount to a sufficient republication. In that regard, the court said: "When thus revoked, it would seem quite incongruous that the instrument could be restored to its original vitality and force by mere words, without any further act done upon, or with reference to, such instrument."[23] When the court was called upon to decide the case of *In re Gould's Will*,[24] it adverted to the preceding case and found it inapplicable to a situation wherein the testator, having one will, made another which was inconsistent with the first although not expressly declaring a revocation, but thereafter destroyed the same. At that time he told his son, who had possession of the first will, to "not let any one get it away from you. I want it to go exactly as it says." Probate of the first will, under these circumstances, was upheld after the court reviewed the rules generally applicable to revival and concluded that the one which made the question depend on testator's intention at the time he destroyed the revocatory instrument was the most reasonable one. The apparent inconsistency may lie in the fact that the first case could be regarded as one in which the written memoranda, in effect, destroyed the first will so there was nothing left to be revived, either by oral statements or anything else. If, on the other hand, since the writing did not touch the words of the will or obliterate it in any respect, the memoranda only amounted to a revocatory "other writing" permitted by statute, then the essential difference between the two cases lies in the fact that in the former the revocatory act remained in existence at the time of the testator's

[23] 37 Vt. 356 at 367-8.

[24] 72 Vt. 316, 47 A. 1082 (1900).

death while in the latter it was itself destroyed in his lifetime. The unwillingness to accept oral declarations in the one case, but to treat them as sufficient in the other is, to say the least, noteworthy. The inference to be gleaned, however, would seem to be that a sufficient revoking act produces an immediate nullification of the earlier will in Vermont and that ecclesiastical principles will control on the issue of revival.

Long prior to the present Virginia statute, which deals with both revocation[25] and revival,[26] it was necessary, in *Bates* v. *Holman*,[27] for the court to consider whether a signed memorandum declaring the intended revocation would be sufficient for that purpose. The testator there, having one will, made a second which was merely inconsistent with the first. After the signature to the second will, he wrote: "I revoke all other wills heretofore made by me," and again signed his name. Some time thereafter he cut the signature from the second will but left the revoking clause with its signature intact. The majority of the court held that the destruction of the second will did not destroy the clause of revocation as it was a separate and effective paper. Without question an express clause in a will there operates immediately and without regard to the ultimate fate of that instrument[28] even though the statute does not expressly so stipulate. There is dictum in *Clark* v. *Hugo*[29] to the effect that a later inconsistent will should also

[25] Va. Code 1942, Ch. 212, § 5233, recites: "No will or codicil, or any part thereof, shall be revoked, unless . . . by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed . . ."

[26] Ibid., § 5234, declares: "No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and then only to the extent to which an intention to revive is shown." Virginia is one of six states requiring re-execution. See 25 CHICAGO-KENT LAW REVIEW 211, notes 91 and 92.

[27] 13 Va. (3 H. & M.) 502 (1809). A dissenting opinion stressed the thought that the clause in question was really part of the second will and fell with it. Later decisions would indicate that even if it was so regarded it still would have accomplished its purpose.

[28] See Rudisill's Ex'r v. Rodes and Wife, 71 Va. (29 Gratt.) 147 (1877).

[29] 130 Va. 99, 107 S. E. 730 (1921). The court actually decided that the second and inconsistent will had been executed when the testator lacked the requisite testamentary intent, so no revocation occurred.

operate to produce the same result, but if the several wills or codicils present only partial inconsistency then, according to *Gordon* v. *Whitlock*,[30] the several instruments should be probated together. Mere oral declarations by the testator that he would die intestate, even when made after his will had been stolen, were deemed insufficient to revoke in the case of *Hylton* v. *Hylton*,[31] and that result is supported by the present statute.

Three Virginia cases bear out the statutory mandate that a revoked will shall not be revived otherwise than by the re-execution thereof or by some proper codicil. Oral declarations by the testator are not, and even prior to the statute were not, admissible to show a republication of the revoked will.[32] Similarly, destruction of the revoking will alone will not suffice.[33] But the case of *Gooch* v. *Gooch*[34] has some interesting implications. The testator there concerned had children born to him after he had made a will in favor of his wife, which fact, pursuant to statute, nullified his will. The widow claimed that the will had been revived by reason of the fact that the testator, after the birth of his children and as part of the ceremony of initiation into the Masonic order, had written on a form provided by the lodge secretary the statement: "My will is made in favor of my wife . . . duly signed and filed." The trial court held this to be a sufficient codicil and admitted the will. Such action was affirmed, even though the court admitted the memorandum was not a good holographic codicil since it was partly in print, on the ground that it disclosed testator's intention, at that time, to have the will serve as expressing his testa-

[30] 92 Va. 723, 24 S. E. 342 (1896). The testator there possessed a large estate and had prepared a very carefully drawn will. He later made a holographic will having reference to only a few matters, dealing with a small part of the estate, and containing no revocatory clause. Three brief codicils were also made. All the papers were taken together as constituting his will. Stress had been placed on the fact that the holographic instrument started out with the words: "My will is as follows." It was claimed that these words were indicative of an intention to revoke the earlier will. The court said that these words, standing alone, were not entitled to the weight attached to them.

[31] 42 Va. (1 Gratt.) 161 (1844).

[32] Bates v. Holman, 13 Va. (3 H. & M.) 502 (1809).

[33] Rudisill's Ex'r v. Rodes and Wife, 71 Va. (29 Gratt.) 147 (1877).

[34] 134 Va. 21, 113 S. E. 873 (1922).

mentary purposes and it did not have to be a sufficient dispositive instrument. Other re-execution or republication was held to be unnecessary.

If the Washington revocation statute means what it says, there is only one method available in that state, to-wit: the making of a subsequent will in writing.[35] Whether that will must expressly declare the revocation or not, or whether a revoking codicil would serve, are unsolved mysteries. The state also possesses a revival provision,[36] typical of those found on the west coast, but it also has received no interpretation although it is pregnant with doubt as to the nature of the "terms of such revocation" which will serve to display the testator's "intention to revive," just as is the case as to the true nature of the ceremony of republication specified as an alternative method of revival. Only one point seems clear and that is that if revival takes place it must be with respect to the entire first will for partial revival is not mentioned. These are problems about which much has been said elsewhere but not in the decisions of the courts of that state.

Revocation is possible, in West Virginia, by either a subsequent will, a codicil, or by some other written declaration,[37] but revival can only be accomplished by a re-execution of the will or by a suitable codicil, and then only to the extent that intention to revive is shown.[38] Illustrative of the problems connected with revocation is the case of *Kearns* v. *Roush*.[39] The facts therein dis-

[35] Remington Wash. Rev. Stat. Ann. 1932, Vol. 3, Tit. 10, Ch. 3, § 1398, states: "No will in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked except by a subsequent will in writing . . ."

[36] Ibid., § 1405, specifies: "If, after making any will, the testator shall duly make and execute a second will, the destruction, cancellation, or revocation of such second will shall not revive the first will unless it appears by the terms of such revocation that it was his intention to revive and give effect to the first will, or unless he shall duly republish his first will."

[37] W. Va. Code Ann. 1943, Ch. 41, § 4045, specifies: "No will or codicil, or any part thereof, shall be revoked, unless . . . by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed . . ."

[38] Ibid., § 4046, provides: "No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the reexecution thereof, or by a codicil executed in the manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown."

[39] 106 W. Va. 663, 146 S. E. 729 (1929).

close that in 1914 testator made a holographic will disposing of his entire estate and appointing executors. Some time later he drew up another which commenced with the words, "This is my last will, which I write now." It was undated, contained no express clause of revocation, but did purport to make a totally inconsistent disposition of the estate. Internal and external circumstances fixed the making of this instrument sometime subsequent to the 1914 will. A day or so before testator's death he asked the housekeeper to find "his will," but she overlooked the second document which was later found folded up in a ledger on the desk. The first instrument was located the day after testator died. Both these wills were admitted to probate, but on appeal by the legatees under the second it was held that the first will should be eliminated and the executor therein named be removed. The court said that the making of the second will, absent an express clause of revocation, had not produced an immediate revocation of the earlier will, nor had the holographic reference to a "last will" done so, but that the total inconsistency between the two made that result necessary and the inconsistency was "total" enough even though the second failed to nominate an executor. The mere fact that the first will had been preserved was said to possess no significance.

The other West Virginia case, that of *Gulland* v. *Gulland,*[40] sheds light on the revival provision. The will there concerned, made in favor of testator's wife, had been executed prior to the birth of issue. Thereafter two children were born, but shortly before testator's death he executed a duly attested codicil which read: "I hereby certify that I have heretofore made a will disposing of all of my estate, which will has never been revoked by me." The testator's widow sued to remove an alleged cloud on the title to the land growing out of the fact that, by local law, a will made prior to birth of issue opens up to limit any devise or bequest to take effect only if the after-born child dies unmarried and without issue. The trial court sustained a demurrer to the bill on the ground that the codicil did not amount to a republication or

[40] 81 W. Va. 487, 94 S. E. 943 (1918).

remaking of the will since there was no reference to the after-born children therein. The higher court acknowledged that there was a distinction between republication of an existing will and revival of a revoked will, particularly since the revoked will must be re-executed or the codicil must show an intention to revive it, but reversed the decision because the instant will had not been revoked even if it had been materially altered by making absolute devises into conditional ones. The codicil was regarded as a sufficient republication for, while the language was not apt, the form of the expression was not deemed important. The emphasis on the need for a suitable declaration of an intention to revive if the earlier will is actually revoked should not escape attention.

Amplification on a Wisconsin statute dealing with revocation only[41] has been provided by one important decision rendered in that state. The case of *In re Noon's Will*[42] involved a testator whose first will and codicil were found in a package which he had placed in the hands of the county judge shortly before his death. There was evidence that a second will had been executed which contained a clause of revocation, but it could not be found. That fact established, the court said: "The addition of the revocatory words is a mode of immediate cancellation of the former will, and renders it totally inoperative as a testamentary instrument."[43] It then proceeded to the question of revival. In that regard it said:

> The first will having become legally dead by revocation, we can see no way in which it could be revitalized except by some act which the law recognizes as being equivalent to execution under the statute. A codicil or subsequent writing adopting the former will, duly executed, or a re-execution of the old will

[41] Wis. Stats. 1945, Ch. 238, § 238.14, declares: "No will nor any part thereof shall be revoked unless by . . . some other will or codicil in writing, executed as prescribed in this chapter, or by some other writing, signed, attested and subscribed in the manner provided in this chapter for the execution of a will . . ." The section concludes with the statement that "the power to make a will implies the power to revoke the same." Legislation so specific is rarely found, but the idea has been tacitly accepted everywhere.

[42] 115 Wis. 299, 91 N. W. 670, 95 Am. St. Rep. 944 (1902).

[43] 115 Wis. 299 at 302, 91 N. W. 670 at 671.

> with the required formalities, would undoubtedly revive it. Any act short of that would lead to confusion. . . We believe the better and safer rule to be to require that a will once revoked, to be revived, must either be re-executed or adopted by some subsequent writing executed as the statute requires.[44]

Obviously, therefore, the mere destruction of the second will had not accomplished a revival, hence the decedent died intestate. What the result would have been had the second will presented only a problem of inconsistency is an unsettled question. In the case of *Estate of Laege*[45] there is language which seems to recognize inconsistency as a permissible form of revocation, but the case actually duplicates the situation in the Noon case and attains the same result so anything said on the point lacks the authority necessary to a binding precedent.

The Wyoming statute, silent on revival, authorizes revocation either by will or by codicil.[46] Reliance was placed on that statute, in *Pardee* v. *Kuster*,[47] to clear up a tangled situation. The testator had made a will giving his entire estate to his son. It was claimed that the next day he signed an instrument in the form of a deed conveying a parcel of land to the plaintiff therein, the instrument reciting: "This instrument is to be in full force and effect from and after my death." The deed was never delivered and was never thereafter seen. Two more days later, testator made a codicil in which he referred to his will and ratified it in all respects except that he provided that if the son died within two years after his death the entire estate should go to testator's half-brother. After the will and the codicil had been admitted to probate, plaintiff sued to establish the deed as a lost or fraudulently destroyed codicil to the will. Relief was denied when the court, assuming for the purpose that the deed was a codicil, held that it

[44] 115 Wis. 299 at 303, 91 N. W. 670 at 671.

[45] 180 Wis. 32, 192 N. W. 373 (1923).

[46] Wyo. Comp. Stats. Ann. 1945, Vol. 1, Ch. 6, § 6-306, states: "No will or any part thereof shall be revoked unless . . . by some other will or codicil in writing, signed, attested and subscribed in the manner provided by law for the execution of a will . . ."

[47] 15 Wyo. 368, 89 P. 572 (1907).

had been nullified, if not expressly at least by the inconsistency, because of the formal codicil which had been made. There is no statute nor any decision in Wyoming touching on revival, so these matters yet remain to be determined.

SUMMARY

This survey of judicial decisions dealing with revocation and revival of wills, even when taken state by state, discloses an almost kaleidoscopic pattern of confusing factual situations and legal determinations from which one could draw a parallel case to fit almost every set of circumstances which human ingenuity or carelessness could produce or to bolster up an argument on either side of some particular problem. Such being the case, there might be some worth in arranging these decisions, both pro and con, in much the same order as the wide variety of possible problems are likely to develop out of a given set of circumstances.

Start with a testator who has made one valid will which remains intact at the time of his death, or if not capable of production, may be established as a lost will,[48] so probate thereof is likely to be attempted. Add the fact that he has made a subsequent formal will, validly executed,[49] by which he expressly declares the revocation of the earlier will but which revocatory will no longer

[48] See Page, The Law of Wills, 2d Ed., Vol. 1, § 632 et seq.

[49] The second will necessarily fails to produce a revocation if it is made [1] by a testator who lacks testamentary capacity: Sewall v. Robbins, 139 Mass. 164, 29 N. E. 650 (1885), Clark v. Hugo, 130 Va. 99, 107 S. E. 730 (1921); [2] is made because of an undue influence: O'Brion, Appellant, 120 Me. 434, 115 A. 169 (1921). Laughton v. Atkins, 18 Mass. (1 Pick.) 535 (1822), Rudy v. Ulrick, 69 Pa. 177 (1871); [3] is inadequately witnessed: Thompson, Appellant, 116 Me. 473, 102 A. 303 (1917), Leard v. Askew, 28 Okla. 300, 114 P. 251, Ann. Cas. 1912D 234 (1911); [4] is witnessed by incompetent persons: Moore v. Rowlett, 269 Ill. 88, 109 N. E. 682 (1915); or [5] fails to comply with statutory requirements for valid execution: Holingshead v. Sturgis, 21 La. Ann. 450 (1869), Woodward v. Woodward, 37 Tenn. (5 Sneed) 49 (1857). But as to necessity for prior judicial approval of revocatory wills signed by Indian wards, see Phillips v. Smith, 186 Okla. 636, 100 P. (2d) 249 (1940). The burden of proof to establish that the alleged revocatory will was validly executed rests on the contestant: In re Sloan-Rutledge's Will, 210 Iowa 1256, 232 N. W. 674 (1930), In re Rinker's Estate, 158 Kas. 406, 147 P. (2d) 740 (1944).

remains in existence[50] so that its only present value might be to support contest on the idea that the earlier will has been revoked and ought not be admitted to probate. Assuming that the contestant of the earlier will can sustain the burden of proof of these facts,[51] the question immediately presented is whether or not the second will produced an instant revocation by reason of its execution[52] or failed in its purpose because it did not survive the testator

[50] Evidence tended to show a deliberate destruction in James v. Marvin, 3 Conn. 576 (1821); Whitehill v. Halbing, 98 Conn. 21, 118 A. 454, 28 A. L. R. 895 (1922); Blackett v. Ziegler, 153 Iowa 344, 133 N. W. 901, 37 L. R. A. (N. S.) 291 (1911); Linginfelter v. Linginfelter, 3 Ky. (1 Hardin) 127 (1807); Succession of Dambly, 191 La. 500, 186 So. 7 (1938); Scott v. Fink, 45 Mich. 241, 7 N. W. 799 (1881); Danley v. Jefferson, 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640 (1908); Bohanon v. Walcot, 2 Miss. (1 How.) 336, 29 Am. Dec. 631 (1836); Randall v. Beatty, 31 N. J. Eq. (4 Stew.) 643 (1879). In the case of In re Cunningham, 38 Minn. 169, 36 N. W. 269 (1888), the revoking will was destroyed by the testator during a period of mental incompetency. The presumption of destruction was relied on in In re Johnston's Estate, 188 Cal. 336, 206 P. 628 (1922); Stetson v. Stetson, 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258 (1903); In re Davis' Estate, 134 N. J. Eq. 393, 35 A. (2d) 880 (1944).

[51] Contestant did so succeed in In re Ford's Will, 135 Misc. 630, 239 N. Y. S. 252 (1930); Puckett v. Brittain, 152 Okla. 184, 3 P. (2d) 876 (1931); Legare v. Ashe, 1 S. C. L. (1 Bay) 464 (1795); In re Bell's Estate, 13 S. Dak. 475, 83 N. W. 566 (1900). But this record of success is outweighed by the cases in which contestant failed to establish that a revoking will ever existed: In re Thompson's Estate, 185 Cal. 763, 198 P. 795 (1921); Minor v. Guthrie, 9 Ky. L. R. 113, 4 S. W. 179 (1887); Lord's Appeal, 106 Me. 51, 75 A. 286 (1909); Aldrich v. Aldrich, 215 Mass. 164, 102 N. E. 487, Ann. Cas. 1914C 906 (1913); Connery v. Connery, 175 Mich. 544, 141 N. W. 615 (1913); Dingman v. Dingman, 199 Mich. 384, 165 N. W. 712 (1917); Vining v. Hall, 40 Miss. 83 (1866); Williams v. Miles, 87 Neb. 455, 127 N. W. 904 (1910); Nelson v. McGiffert, 3 Barb. Ch. 158 (N. Y. 1848); In re Wear's Will, 131 App. Div. 875, 116 N. Y. S. 304 (1909); In re Palmer's Will, 122 Misc. 177, 203 N. Y. S. 487 (1923); In re Cunnion's Will, 201 N. Y. 123, 94 N. E. 648 (1911); In re Harrison's Estate, 316 Pa. St. 15, 173 A. 407 (1934); In re Koehler's Estate, 316 Pa. St. 321, 175 A. 424 (1934); In re Noyes' Will, 61 Vt. 14, 17 A. 473 (1889).

[52] Immediate revocation was held to have occurred in Lones v. Lones, 108 Cal. 688, 41 P. 771 (1895); James v. Marvin, 3 Conn. 576 (1821); Barksdale v. Hopkins, 23 Ga. 332 (1857); Burns v. Travis, 117 Ind. 44, 18 N. E. 45 (1888); Blackett v. Ziegler, 153 Iowa 344, 133 N. W. 901, 37 L. R. A. (N. S.) 291 (1911); In re Cameron's Estate, 215 Iowa 63, 241 N. W. 458 (1932); Singleton v. Singleton, 269 Ky. 330, 107 S. W. (2d) 273 (1937); Succession of Boudreau, 10 La. Ann. 709 (1855); Succession of Dambly, 191 La. 500, 186 So. 7 (1938); Colvin v. Warford, 20 Md. 357 (1863); Wallis v. Wallis, 114 Mass. 510 (1874); Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322 (1883); Scott v. Fink, 45 Mich. 241, 7 N. W. 799 (1881); Stevens v. Hope, 52 Mich. 65, 17 N. W. 698 (1883); Danley v. Jefferson, 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640 (1908); In re Cunningham, 38 Minn. 169, 36 N. W. 269 (1888); Bohanon v. Walcot, 2 Miss. (1 How.) 336, 29 Am. Dec. 631 (1836); Hairston v. Hairston, 30 Miss. 276 (1885); In re Moore's Estate, 72 N. J. Eq. 371, 65 A. 447 (1907); In re Davis' Estate, 134 N. J. Eq. 393, 35 A. (2d) 880 (1944); In re Ford's Will, 135 Misc. 630, 239 N. Y. S. 252 (1930); In re Stickney's Will, 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246 (1899), affirming 52 N. Y. S. 929 (1898); Love v. Johnston, 34 N. C. 355 (1850), but see Marsh v. Marsh, 48 N. C. (3 Jones L.) 77, 64 Am. Dec. 598 (1855); Pauly v. Crooks, 41 Ohio App. 1, 179 N. E. 364 (1931), semble; Phillips v. Smith, 186 Okla. 636, 100 P. (2d) 249 (1940);

to become a probatable document, so may be declared to possess only an ambulatory character.[53]

Substitute, in lieu thereof, the fact that the subsequent formal will lacked an express clause of revocation but was totally[54] or partly inconsistent[55] and has also remained in existence, so as to

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In re Ford's Estate, 301 Pa. St. 183, 151 A. 789 (1930); In re Bell's Estate, 13 S. Dak. 475, 83 N. W. 566 (1900); McClure v. McClure, 86 Tenn. 173, 6 S. W. 44 (1887); Hawes v. Nicholas, 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863 (1899); Brackenridge v. Roberts & McIntyre, 114 Tex. 418, 267 S. W. 244 (1924), reh. den. 270 S. W. 1001 (1925); In re Noon's Will, 115 Wis. 299, 91 N. W. 670, 95 Am. St. Rep. 944 (1902). Express revocation was limited, in Rabe v. McAllister, 177 Md. 97, 8 A. (2d) 922 (1939), to the will expressly referred to in the subsequent will and was not carried over to other existing earlier wills.

[53] Revocatory wills have been treated as possessing only a common-law ambulatory effect in Whitehill v. Halbing, 98 Conn. 21, 118 A. 454, 28 A. L. R. 895 (1922), noted in 32 Yale L. J. 70; Shaefer v. Voyle, 88 Fla. 170, 102 So. 7 (1925), but since changed by statute; Stetson v. Stetson, 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258 (1903); Crooker v. McArdle, 332 Ill. 27, 163 N. E. 384 (1928); Linginfelter v. Linginfelter, 3 Ky. (1 Hardin) 127 (1807); Succession of Dambly, 191 La. 500, 186 So. 7 (1938), noted in 1 La. L. Rev. 464; Lawson v. Morrison, 2 Dall. 286, 1 L. Ed. 384, 1 Am. Dec. 288 (Pa., 1792), but see contra In re Ford's Estate, 301 Pa. St. 183, 151 A. 789 (1930); Bates v. Hacking, 28 R. I. 523 (1907), affirmed in 29 R. I. 1, 68 A. 622, 125 Am. St. Rep. 759, 14 L. R. A. (N. S.) 937 (1908); Taylor v. Taylor, 2 Nott & McCord 482 (S. C., 1820); Kollock v. Williams, 131 S. C. 352, 127 S. E. 444 (1925). By contrast with the cases listed in the preceding note, these decisions represent a minority view. The decision in In re Engle's Estate, 129 Ore. 77, 276 P. 270 (1929), must be read in the light of the qualification that the purported revocation there attempted violated the terms of an agreement to devise in return for lifetime support. It is not a general determination as to the ambulatory character of a revoking will.

[54] Total inconsistency has been held sufficient to produce revocation in Allen v. Bromberg, 147 Ala. 317, 41 So. 771 (1906); In re Iburg's Estate, 196 Cal. 333, 238 P. 74 (1925); Lively v. Harwell, 29 Ga. 513 (1859), affirmed in 30 Ga. 315, 76 Am. Dec. 649 (1860); Lasier v. Wright, 304 Ill. 130, 136 N. E. 545 (1922); Kern v. Kern, 154 Ind. 29, 55 N. E. 1004 (1900); Succession of Bowles, 3 Rob. 31 (La., 1842); Gardner v. McNeal, 117 Md. 27, 82 A. 288, Ann. Cas. 1914A 119 (1911); Hairston v. Hairston, 30 Miss. 276 (1885); Beaumont v. Keim, 50 Mo. 28 (1872); Neibling v. Methodist Orphans' Home Ass'n, 315 Mo. 578, 286 S. W. 58 (1926); In re Drake, 15 N. J. Misc. 484, 192 A. 428 (1937); Simmons v. Simmons, 26 Barb. 68 (N. Y., 1857); In re Bourassa's Estate, 171 Okla. 64, 41 P. (2d) 851 (1935); In re Burtt's Estate, 353 Pa. St. 217, 44 A. (2d) 670 (1945); McClure v. McClure, 86 Tenn. 173, 6 S. W. 44 (1887), approving an instruction to that effect; Dougherty v. Holscheider, 40 Tex. Civ. App. 31, 88 S. W. 1113 (1905), despite fact will was contingent on events which never occurred; In re Gould's Will, 72 Vt. 316, 47 A. 1082 (1900); Kearns v. Roush, 106 W. Va. 663, 146 S. E. 729 (1929); Estate of Laege, 180 Wis. 32, 192 N. W. 373 (1923), dictum only. In the case of Hamilton's Estate, 74 Pa. St. 69 (1873), the operation of the inconsistent will was made to depend on testator's living for specified period and never took effect but, by inference, it would have produced a revocation if it had become effective. *Contra:* Peck's Appeal, 50 Conn. 562 (1883); Rabe v. McAllister, 177 Md. 97, 8 A. (2d) 922 (1939); Cheever v. North, 106 Mich. 390, 64 N. W. 455, 58 Am. St. Rep. 499, 37 L. R. A. 561 (1895), approving instruction to that effect. There is dicta in Blackett v. Ziegler, 153 Iowa 344, 133 N. W. 901, 37 L. R. A. (N. S.) 291 (1911), indicating that an inconsistent will would possess only ambulatory effect in that state.

[55] Partial inconsistency does not, and logically ought not, produce revocation of the entire earlier will, hence acts more in the nature of a codicil: Clarke v.

present the probem of whether or not both wills should be probated leaving reconciliation to be worked out later,[56] or has itself been subsequently destroyed so can have worth, if at all, solely as a means of sustaining the claim of revocation.[57] If not, then change "subsequent formal will" to "duly executed codicil,"[58] one declaring for revocation[59] or substituting different provisions for those in the original will,[60] which either still exists in probatable condition[61] or has been destroyed[62] so as to again generate

Ransom, 50 Cal. 594 (1875); Estate of Schnoor, 4 Cal. (2d) 590, 51 P. (2d) 424 (1935); Succession of Lefort, 139 La. 51, 71 So. 215, Ann. Cas. 1917E 769 (1916); Marston v. Marston, 17 N. H. 503 (1845); In re Venable's Will, 127 N. C. 344, 37 S. E. 465 (1900).

[56] Probate of both wills was granted in Clarke v. Ransom, 50 Cal. 594 (1875); In re Wolfe's Will, 185 N. C. 563, 117 S. E. 804 (1923), where actually there was neither total nor partial inconsistency; and in Gordon v. Whitlock, 92 Va. 723, 24 S. E. 342 (1896); in all of which cases total inconsistency was lacking. Probate of the earlier will has been denied when the later will, still in existence, discloses a total inconsistency: Austin v. Fiedler, 40 Ark. 144 (1882); Lasier v. Wright, 304 Ill. 130, 136 N. E. 545 (1922); Neibling v. Methodist Orphans' Home Ass'n, 315 Mo. 578, 286 S. W. 58 (1926); In re Drake, 15 N. J. Misc. 484, 192 A. 428 (1937).

[57] In all of the cases cited in note 54, ante, except for Peck's Appeal, 50 Conn. 562 (1883), probate of the earlier will was denied whether the subsequent will survived or not. The exception noted turned on the fact that the subsequent will was regarded as possessing only an ambulatory character. Declarations by the testator, either as to the fact of the erstwhile existence of the subsequent will or its contents, have not been regarded as sufficient: Giles v. Giles, 204 Mass. 383, 90 N. E. 595 (1910); Hickey v. Beeler, 180 Tenn. 31, 171 S. W. (2d) 277 (1943). But see Lane v. Hill, 68 N. H. 275, 44 A. 393, 73 Am. St. Rep. 591 (1900).

[58] The alleged codicil in the case of In re Will of Charlotte Murray, 20 Ohio N. P. (N. S.) 305 (1917), was not witnessed. It was, however, regarded as acceptable for purpose of revival even though insufficient to produce a revocation.

[59] Such a codicil produced revocation in Slaughter's Adm'r v. Wyman, 228 Ky. 226, 14 S. W. (2d) 777 (1929); In re Scott's Will, 88 Minn. 386, 93 N. W. 109 (1903); and Holley v. Larrabee, 28 Vt. 274 (1856). The express language of revocation in a codicil should be clear and unambiguous according to Laborde v. First State Bank & Trust Co., 101 S. W. (2d) 389 (Tex. Civ. App., 1937). There is dictum in In re Diament's Estate, 84 N. J. Eq. 135, 92 A. 952 (1915), affirmed in 88 N. J. Eq. 552, 103 A. 199 (1918), to the effect that an express codicil on the subject must remain in existence to produce a revocation.

[60] At least partial revocation was thereby produced in In re Toomey's Estate, 96 Mont. 489, 31 P. (2d) 729 (1934); Osburn v. Rochester T. & S. Dep. Co., 209 N. Y. 54, 102 N. E. 571, 46 L. R. A. (N. S.) 983 (1913); In re Campbell's Will, 170 N. Y. 84, 62 N. E. 1070 (1902); and Pardee v. Kuster, 15 Wyo. 368, 89 P. 572 (1907).

[61] The codicils survived and were produced in the following cases, thereby accomplishing total or partial revocation: Slaughter's Adm'r v. Wyman, 228 Ky. 226, 14 S. W. (2d) 777 (1929); In re Toomey's Estate, 96 Mont. 489, 31 P. (2d) 729 (1934); In re Campbell's Will, 170 N. Y. 84, 62 N. E. 1070 (1902); Holley v. Larrabee, 28 Vt. 274 (1856); Pardee v. Kuster, 15 Wyo. 368, 89 P. 572 (1907). In the case of In re Scott's Will, 88 Minn. 386, 93 N. W. 109 (1903), the revocatory language in the surviving codicil was treated as effective even though its substituted dispositive provisions failed.

[62] Erstwhile codicils had been destroyed in the cases of In re Diament's Estate, 84 N. J. Eq. 135, 92 A. 952 (1915), affirmed in 88 N. J. Eq. 552, 103 A. 199 (1918);

the question of revocation.[63] Make one further change, this time substituting some anomalous non-testamentary writing duly executed by the testator[64] which expressly declares for revocation[65] or does so by implication[66] thereby again producing the fundamental problem as to whether revocation has occurred at all.

Before determining that revocation has or has not occurred, however, do not overlook the possibility that any of the aforementioned documents, while validly executed, may fail for some other internal[67] or external reason[68] and, being inoperative, may

Matter of Simpson, 56 How. Prac. 125 (N. Y., 1878); Osburn v. Rochester T. & S. Dep. Co., 209 N. Y. 54, 102 N. E. 571, 46 L. R. A. (N. S.) 983 (1913); and In re Kathan's Will, 141 N. Y. S. 705 (1913).

[63] The attempted revocation failed with the destruction of the codicil involved in In re Diament's Estate, 84 N. J. Eq. 135, 92 A. 952 (1915), and Matter of Simpson, 56 How. Prac. 125 (N. Y., 1878). The latter case turns on the construction to be given to a statute authorizing revocation by a "subsequent will" but silent as to whether a codicil can serve. But see Osburn v. Rochester T. & S. Dep. Co., 209 N. Y. 54, 102 N. E. 571, 46 L. R. A. (N. S.) 983 (1913).

[64] Defective execution existed in Barnewall v. Murrell, 108 Ala. 366, 18 So. 831 (1895); Board of National Missions, etc. v. Sherry, 372 Ill. 272, 23 N. E. (2d) 730 (1939); In re Rinker's Estate, 158 Kas. 406, 147 P. (2d) 740 (1944); Holingshead v. Sturgis, 21 La. Ann. 450 (1869); Brown v. Thorndike, 32 Mass. (15 Pick.) 388 (1834); and in In re Aker's Will, 74 App. Div. 461, 77 N. Y. S. 643 (1902), affirmed in 173 N. Y. 620, 66 N. E. 1103 (1903), so the non-testamentary writing was regarded, in each instance, as being ineffective for purpose of revocation. In Witter v. Mott, 2 Conn. 67 (1816), however, no particular formalities were considered necessary.

[65] Validly executed non-testamentary writings which were express on the point were given operative effect in Grotts v. Casburn, 295 Ill. 286, 129 N. E. 137 (1920); In re Moore's Estate, 72 N. J. Eq. 371, 65 A. 447 (1907), where found in a will; Chestnut v. Capey, 45 Okla. 754, 146 P. 589 (1915); Billington v. Jones, 108 Tenn. 234, 66 S. W. 1127, 56 L. R. A. 654 (1901); Warner v. Warner's Estate, 37 Vt. 356 (1864); and Bates v. Holman, 13 Va. (3 H. & M.) 502 (1809).

[66] In Derr v. Derr, 123 Kas. 681, 256 P. 800 (1927), the court deemed the words "I wish my first will to be in effect this date" indicative of an intention to revoke the subsequent will. But see Newboles v. Newboles, 169 Ark. 282, 273 S. W. 1026 (1925), where it was held that the statement "This is to certify that I have this day decided not to will my land to my son" was insufficient to revoke as it did not refer to a particular will nor expressly purport to revoke it.

[67] See Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1923), where the document was valid as a will but insufficiently executed as a revocatory instrument. Compare with Succession of Boudreau, 10 La. Ann. 709 (1855); Dudley v. Gates, 124 Mich. 440, 83 N. W. 97 (1900); and In re Scott's Will, 88 Minn. 386, 93 N. W. 109 (1903), where revocation was upheld although the instrument failed as a testamentary disposition.

[68] Inability of the devisee to take under the subsequent will had not prevented revocation, according to Hairston v. Hairston, 30 Miss. 276 (1885); Price v. Maxwell, 28 Pa. St. 23 (1857); and In re Melvilles Estate, 245 Pa. 318, 91 A. 679 (1914). But see Security Company v. Snow, 70 Conn. 288, 39 A. 153 (1898), where a trust in the subsequent will failed because the trustee died and the court held that the wide discretionary powers conferred could not be exercised by any other person; as a consequence, the codicil fell leaving the original will to stand.

lead back to the prime question. Nor, for that matter, pass idly over the chance that oral declarations may have been made by the testator bearing on the question of revocation[69] or the possibility that he may have developed his own, albeit unusual, methods for revoking his earlier will.[70] By then, however, it should be possible to decide whether the original will has survived unscathed. If it has not, it may then become necessary to delve into the mysteries of revival.

One facing the question of revival will probably first notice that the most significant issue will develop around the fact that the revocatory document is no longer in existence from which may arise a question whether a presumption of any kind can be drawn from the bare fact of its destruction. Although there are some cases indicating the existence of at least a prima facie presumption of intention to revive to be drawn from the fact of preservation of the earlier will and the destruction of the revocatory instrument,[71]

[69] Prior to any statute, oral statements showing purpose to revoke were considered sufficient in Card v. Grinnan, 5 Conn. 164 (1821). Oral declarations such as to die intestate and the like were ineffective in Succession of Hill, 47 La. Ann. 329, 16 So. 819 (1895); Bird v. Bird, 165 Md. 349, 168 A. 855 (1933); Giles's Heirs v. Giles's Ex'rs, Conf. Rep. 174, 1 N. C. 290 (1801); Devisees of McCune v. House and Litch, 8 Ohio 144 (1837); Allen v. Huff, 9 Tenn. (1 Yerg.) 404 (1830); Grimes v. Nashville Trust Co., 176 Tenn. 366, 141 S. W. (2d) 890 (1940); Hylton v. Hylton, 42 Va. (1 Gratt.) 161 (1844).

[70] Revocation was produced, in Walton v. Walton, 7 Johns. Ch. 258 (N. Y., 1823), by a contract to sell the devised lands even though that contract was subsequently rescinded. In Appeal of Deaves, 140 Pa. St. 242, 21 A. 395 (1891), it was held that testator's inaction, after he learned that his will was lost, amounted to a revocation thereof. The making of a property settlement at divorce is not enough, Succession of Cunningham, 142 La. 701, 77 So. 506 (1918), nor is a conveyance of the devised property to the devisee, Caine v. Barnwell, 120 Miss. 209, 82 So. 65 (1919). See also Ragland v. Wagener, 142 Tex. 651, 180 S. W. (2d) 435, 152 A. L. R. 1232 (1944), where the devise was purportedly made contingent on the fact that testator prepare and leave on deposit a deed of conveyance to the land to be delivered after his death.

[71] A presumption in favor of revival was applied in Colvin v. Warford, 20 Md. 357 (1863); Rabe v. McAllister, 177 Md. 97, 8 A. (2d) 922 (1939); Randall v. Beatty, 31 N. J. Eq. (4 Stew.) 643 (1879), where the court said the fact that testatrix "kept the will is the most cogent evidence of her intention that it should be revived"; McCartan's Estate, 58 Pitts. L. J. 364 (Pa., 1910); Wulff's Estate, 26 Pa. Dist. Rep. 144 (1916); and McClure v. McClure, 86 Tenn. 173, 6 S. W. 44 (1887), where the court said that preservation of the earlier will upon destruction of the revoking one was evidence of an "intent to republish" the same. But see Ewell v. Rucker, 28 Tenn. App. 156, 187 S. W. (2d) 644 (1945). In Boudinot v. Bradford, 2 Dall. 266, 1 L. Ed. 375 (Pa., 1796), the court would have applied such a presumption but for the fact that certain contemporaneous statements by the testator disclosed a desire to die intestate. There is dictum to support such a presumption in Estate of Schnoor, 4 Cal. (2d) 590, 51 P. (2d) 424 (1935); Stetson v. Stetson, 200

most of the cases on the point declare either that there is no basis for any presumption[72] or that the presumption is rather to the contrary,[73] particularly so where there is a statute regulating the manner of revival.[74]

Such being the case, one must seek further for evidence of revival. In that regard, oral declarations made at the moment of the destruction of the revocatory instrument may[75] or may not be

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Ill. 601, 66 N. E. 262, 61 L. R. A. 258 (1903); and Succession of Moore, 196 So. 79 (La. App., 1940), but in each of these last instances the court actually decided that the original will had never been revoked.

[72] There is no presumption either way according to James v. Marvin, 3 Conn. 576 (1821), and Scott v. Fink, 45 Mich. 241, 7 N. W. 799 (1881).

[73] See Blackett v. Ziegler, 153 Iowa 344, 133 N. W. 901, 37 L. R. A. (N. S.) 291 (1911), where the court indicated that to permit automatic revival would be dangerous as the testator might not have destroyed the first will merely because he might have forgotten about it; In re Farley's Estate, — Iowa —, 24 N. W. (2d) 453 (1946); Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322 (1883); Bohanon v. Walcot, 2 Miss. (1 How.) 336, 29 Am. Dec. 631 (1836); Lane v. Hill, 68 N. H. 275, 44 A. 393, 73 Am. St. Rep. 591 (1900); Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 62 L. R. A. 383 (1903), reh. den. 68 Neb. 463, 96 N. W. 151 (1903); In re Davis' Estate, 134 N. J. Eq. 393, 35 A. (2d) 880 (1944); In re Moore's Estate, 72 N. J. Eq. 371, 65 A. 447 (1907); Ewell v. Rucker, 28 Tenn. App. 156, 187 S. W. (2d) 644 (1945); Hawes v. Nicholas, 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863 (1899); In re Gould's Will, 72 Vt. 316, 47 A. 1082 (1900); and In re Noon's Will, 115 Wis. 299, 91 N. W. 670, 95 Am. St. Rep. 944 (1902).

[74] Support for views expressed in the following cases rests primarily on statutes regulating the manner by which revival may be accomplished: Allen v. Bromberg, 147 Ala. 317, 41 So. 771 (1906); Lones v. Lones, 108 Cal. 688, 41 P. 771 (1895); Estate of Bassett, 196 Cal. 576, 238 P. 666 (1925); Lively v. Harwell, 29 Ga. 513 (1859), affirmed in 30 Ga. 315, 76 Am. Dec. 649 (1860); Kern v. Kern, 154 Ind. 29, 55 N. E. 1004 (1900); Singleton v. Singleton, 269 Ky. 330, 107 S. W. (2d) 273 (1937); Beaumont v. Keim, 50 Mo. 28 (1872); In re Hedge's Will, 136 Misc. 230, 242 N. Y. S. 415 (1930); In re Wear's Will, 131 App. Div. 875, 116 N. Y. S. 304 (1909); In re Barne's Will, 70 App. Div. 523, 75 N. Y. S. 373 (1902); Ludlam v. Otis, 15 Hun. 410 (N. Y., 1878); Rudisill's Ex'r v. Rodes and Wife, 71 Va. (29 Gratt.) 147 (1877). The same attitude has been evidenced where the revoking instrument was merely a codicil producing only a partial change: Osburn v. Rochester T. & S. Dep. Co., 209 N. Y. 54, 102 N. E. 571, 35 Ann. Cas. 1915A 101, 46 L. R. A. (N. S.) 983 (1913).

[75] In Blackett v. Ziegler, 153 Iowa 344, 133 N. W. 901, 37 L. R. A. (N. S.) 291 (1911), the court said that "permissible parol testimony" might suffice. Simultaneous oral declarations were received in Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322 (1883); In re Tibbett's Estate, 153 Minn. 53, 189 N. W. 401 (1922); Marsh v. Marsh, 48 N. C. (3 Jones L.) 77, 64 Am. Dec. 598 (1855); In re Will of Stephenson, 19 Phila. 41 (Pa., 1888); and In re Gould's Will, 72 Vt. 316, 47 A. 1082 (1900), but as there is no statute regulating revival in any of these jurisdictions the holdings throw no light on the meaning of the phrase "by the terms of such revocation" commonly found in revival statutes. See 25 CHICAGO-KENT LAW REVIEW 213. In Danley v. Jefferson, 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640 (1908), the oral statements were said to amount to a "republication" of the original will. Anterior statements were received in Williams v. Williams, 142 Mass. 515, 8 N. E. 424 (1886).

sufficient.[76] Posterior oral declarations will usually be of little value,[77] particularly where the statute requires that revival take the form of a re-execution of the original will.[78] Written evidence of such intention to revive may suffice whether found in the form of a codicil or not.[79]

By far the most prevalent form of revival, however, seems to be that of "republishing" the original will, but there is no uniformity on what constitutes an adequate republication. In some instances mere oral statements indicating a desire to have the earlier will serve as the "last" will have been regarded as enough of a republication to satisfy legal requirements.[80] There is in-

[76] The declarations made in Bohanon v. Walcot, 2 Miss. (1 How.) 336, 29 Am. Dec. 631 (1836), were of a conditional nature, hence insufficient. Those received in In re Ford's Estate, 301 Pa. 183, 151 A. 789 (1930), and Manning's Estate, 46 Pa. Super. 607 (1911), were regarded as acceptable as they negatived intent to revive. Declarations involved in In re Stickney's Will, 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246 (1899), and In re Kuntz's Will, 163 App. Div. 125, 148 N. Y. S. 382 (1914), were rejected because of the peculiar construction there placed on a revival statute. The holding in Collins v. Collins, 110 Ohio St. 105, 143 N. E. 561, 38 A. L. R. 230 (1924), likewise rejecting oral declarations because not in conformity with the court's interpretation of a revival statute, is based upon the New York cases last mentioned.

[77] Barker v. Bell, 46 Ala. 216 (1871), where the original will and the revoking will had both been destroyed, and Warner v. Warner's Estate, 37 Vt. 356 (1864). If the posterior declarations are insufficient to revive, they are likewise insufficient to prevent revival according to Flintham v. Bradford, 10 Pa. 82 (1849). See also Holmes' Estate, 240 Pa. St. 537, 87 A. 778 (1913). There is dictum in Giles's Heirs v. Giles's Ex'rs, Conf. Rep. 174, 1 N. C. 290 (1801), to the effect that if the will had been revoked it could not have been revived "by any subsequent declaration by parol."

[78] Rudisill's Ex'r v. Rodes and Wife, 71 Va. (29 Gratt.) 147 (1877).

[79] In Grotts v. Casburn, 295 Ill. 286, 129 N. E. 137 (1920), and In re Cameron's Estate, 215 Iowa 63, 241 N. W. 458 (1932), the writings designed to nullify the revoking wills and restore the original ones were treated as duly executed and attested codicils, hence sufficient to revive, although totally lacking in dispositive features. The writing in Blackett v. Ziegler, 153 Iowa 344, 133 N. W. 901, 37 L. R. A. (N. S.) 291 (1911), took the form of a codicil designating a new executor to act without bond but made no reference to either will nor was attached to either of them. It was, however, helped out by oral declarations. The signed and attested memorandum in Derr v. Derr, 123 Kas. 681, 256 P. 800 (1927), merely declared: "I wish my first will to be in effect this date." It was held sufficient under a revival statute requiring republication in the presence of two or more competent witnesses who should subscribe their names. A vague and unintelligible writing will not satisfy according to Neibling v. Methodist Orphans' Home Ass'n, 315 Mo. 578, 286 S. W. 58 (1926). The New York revival statute has been interpreted to require that the writing be not only signed but also validly attested: In re O'Donovan's Will, 168 Misc. 362, 6 N. Y. S. (2d) 456 (1938); In re McCaffrey's Estate, 174 Misc. 162, 20 N. Y. S. (2d) 178 (1940).

[80] Danley v. Jefferson, 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640, 13 Ann. Cas. 242 (1908). The case does not disclose that the witnesses to the oral

timation that statements of that character ought to be made in the presence of more than one witness,[81] but only by way of dictum has it ever been asserted that the "republication" witnesses need to record that fact by attestation.[82] The republication might be accomplished through the use of a valid codicil,[83] but again such a document has been regarded as being effective even though it be inadequately attested.[84] Only where the statute requires, or has been interpreted to require, the re-execution has there been any insistence on that method of revival, yet a duly executed codicil is enough for that purpose.[85] If revival occurs at all, and there is one case which would seem to indicate that it is never possible under any set of circumstances,[86] the whole revoked instrument has generally been revived. In only one instance has the court found in favor of a partial revival[87] and there the result was achieved more by applying principles of revocation than because of any doctrines of revival even though the statute in question

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statements were the same as those who had attested the original will. See also In re Kerchner's Estate, 41 Pa. Super. 112 (1909); In re Will of Stephenson, 19 Phila. 41 (Pa., 1888); Havard v. Davis, 2 Binn. 406 (Pa., 1810).

[81] Republication by oral statements in the presence of one of the attesting witnesses was held insufficient in In re Kuntz's Will, 163 App. Div. 125, 148 N. Y. S. 382 (1914). There is dictum in the case of Manning's Estate, 46 Pa. Super. 607 (1911), that an oral republication in the presence of one person, an interested one at that, would not suffice.

[82] Collins v. Collins, 110 Ohio St. 105, 143 N. E. 561, 38 A. L. R. 230 (1924).

[83] Grotts v. Casburn, 295 Ill. 286, 129 N. E. 137 (1920) In re Cameron's Estate, 215 Iowa 63, 241 N. W. 458 (1932). The case of In re Engle's Estate, 129 Ore. 77, 276 P. 270 (1929), would indicate that the reviving codicil does not have to be produced so long as it quondam existence can be established.

[84] See In re Will of Charlotte Murray, 20 Ohio N. P. (N. S.) 305 (1917), where the purported codicil was made by an incompetent person and was unwitnessed yet the court said it was, "in a certain sense, a republication," and admitted the earlier will to probate. But see contrary dictum in Collins v. Collins, 110 Ohio St. 105, 143 N. E. 561, 38 A. L. R. 230 (1924). The Pennsylvania case of In re Shetter's Estate, 303 Pa. St. 193, 154 A. 288 (1931), holds that a codicil executed by the testator will suffice even though attested by interested witnesses.

[85] In re Campbell's Will, 170 N. Y. 84, 62 N. E. 1070 (1902) In re Knapp's Will, 23 N. Y. S. 282 (1893); Gooch v. Gooch, 134 Va. 21, 113 S. E. 873 (1922); Gulland v. Gulland, 81 W. Va. 487, 94 S. E. 943 (1918). A mere re-signing of the original will, even if accompanied by oral declarations made in the presence of witnesses, is not enough according to Love v. Johnston, 34 N. C. 355 (1850).

[86] Brackenridge v. Roberts & McIntyre, 114 Tex. 418, 267 S. W. 244 (1924), reh. den. 270 S. W. 1001 (1925).

[87] Spradlin v. Adams, 182 Ky. 716, 207 S. W. 471 (1919).

made the scope of the revival depend on the extent to which an intention to revive was shown to exist.

If one were to attempt to draw any generalization from this array of confused and confusing statutory materials and judicial decisions it would simply be to point out that, in many states, there is more left to be determined than has been decided but there is much that can be obviated by the drafting of adequate and comprehensive legislation on the subject.

SURVEY OF ILLINOIS LAW FOR THE YEAR 1946-1947*

VIII. TORTS

The volume of tort cases doubtless has not diminished, but there is little of novelty to report about. Two significant cases deal with aspects of defamation not heretofore determined in this state. In *Spanel* v. *Pegler,*[1] the federal Circuit Court of Appeals reversed a decision which had dismissed a complaint in libel. The suit grew out of the publication of a syndicated column in which the columnist had commented upon the fact that plaintiff, president of a corporation, had caused paid advertisements to be published which were more in the nature of political arguments indicative of plaintiff's inclination toward leftist tendencies, advertisements which were certainly never anti-communist in character. The court noted that, while Illinois law was controlling, no decision of this state had yet determined whether or not it was libelous per se to characterize a person as a communist or a communist sympathizer even though that question had elsewhere been answered in the affirmative. It therefore adopted such view as the law to be applied in the case but left it to a jury to determine whether the article in question was susceptible of being understood, by the average reader, to mean that plaintiff was either a communist or a sympathizer. In the other case, that of *Latimer* v. *Chicago Daily News,*[2] plaintiffs were duly licensed attorneys who were engaged in defending certain persons charged with sedition. The defendant published an article referring to that trial in which appeared the statement that "the scum of political gangsterdom in this country are represented by as craven a group of lawyers" as the writer thereof had ever seen. Plaintiffs claimed that, as they were among the "group of lawyers" referred to, they had a right of action for libel. Defendant, on the other hand, contended that as none of the plaintiffs were identified

* The first seven sections of this survey appeared in 26 CHICAGO-KENT LAW REVIEW 1 et seq.

[1] 160 F. (2d) 619 (1947), noted in 14 U. of Chi. L. Rev. 697 and 22 N. Y. U. L. Q. 514.

[2] 330 Ill. App. 295, 71 N. E. (2d) 553 (1947). Leave to appeal has been denied.

specifically no right of action accrued to any particular individual. The Appellate Court affirmed a judgment dismissing the complaint on the ground that where a derogatory remark is made about a group no right of action accrues to any one member of the group unless it can be said that the language used applies, with certainty, to all who compose the group. Again, Illinois precedents were lacking but ample authority to sustain that view exists in other jurisdictions.

Note has already been made of the soft-drink case of *Patargias* v. *Coca-Cola Bottling Company of Chicago.*[3] The complaint therein charged both a breach of warranty and also negligence in permitting a dead mouse to remain in the bottle of soft drink sold to and consumed by plaintiff. Negligence was found to exist in permitting the dead mouse to remain in the bottle at the time of cleaning and filling the same and in failing to discover the defect on inspection.[4] A claim that plaintiff was guilty of contributory negligence was rejected on the ground that while plaintiff noticed an "awful" taste after consuming a portion of the contents, the assurance of her sister, present at the time, that "hers was all right" plus the right to assume the bottle was not contaminated justified plaintiff in consuming the balance of the contents up to the moment when she became aware of the foreign substance. The absence of direct medical evidence that the injury was proximately caused by defendant's negligence was excused with the comment that the "causal connection" was clearly apparent and that it was "unnecessary for the jury to speculate or conjecture" as to the basis for plaintiff's illness.

Mention was made last year of the Appellate Court decision in *Miller* v. *Miller,*[5] a case which did not involve any new point of

[3] 332 Ill. App. 117, 74 N. E. (2d) 162 (1947). A discussion of the warranty aspects of the case appears ante under the topic of Sales.

[4] The court commented upon the inadequacy of the inspection by noting that the person charged with the task admitted that he had to perform a "tedious" operation at the rate of 264 bottles a minute, a speed which could hardly permit of a careful inspection for breaks, cracks and foreign substances.

[5] 328 Ill. App. 171, 65 N. E. (2d) 597 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 88-9.

law but did present a novel factual situation with respect to the guest statute.[6] The plaintiff there concerned had been injured while riding in a trailer truck accompanying some livestock which he had hired the defendant to carry, but a judgment in his favor had been reversed. The Supreme Court took the case on certificate of importance and affirmed the judgment for defendant on the ground that one may be a "guest," even though riding in a trailer truck, providing no manner of payment, either in cash or services, is made for the ride.[7]

The right of an infant to sue for alienation of parental affections was upheld in *Johnson* v. *Luhman*[8] as a proper extension of existing doctrines. It is to be hoped that either the Supreme Court will settle, once and for all, that question or else that the legislature will concern itself with providing a sound and unquestionable basis for such actions.

A statutory change of significance has increased the maximum possible recovery in wrongful death cases of $15,000,[9] but the proviso in that statute concerning suits based on deaths "occuring outside of this state" was given interpretation in *Carroll* v. *Rogers*[10] so as to permit suit here if the actual process of dying occurs in Illinois although the fatal injuries be inflicted elsewhere. The converse of that situation was heretofore held not to deny jurisdiction.[11]

[6] Ill. Rev. Stat. 1947, Ch. 95½, § 58a.

[7] Miller v. Miller, 395 Ill. 273, 69 N. E. (2d) 878 (1946).

[8] 330 Ill. App. 598, 71 N. E. (2d) 810 (1947), noted in 25 CHICAGO-KENT LAW REVIEW 260.

[9] Laws 1947, p. 1094, H. B. 17; Ill. Rev. Stat. 1947, Ch. 70, § 2.

[10] 330 Ill. App. 114, 70 N. E. (2d) 218 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 338.

[11] See Crane v. Chicago & Western R. R. Co., 233 Ill. 259, 84 N. E. 222 (1908).

NOTES AND COMMENTS

Applicability of Substituted Service Statute to Resident Automobile Drivers

Forward-looking steps were taken by every American jurisdiction, after the decision of the United States Supreme Court in *Hess* v. *Pawlowski*,[1] to subject the non-resident motorist to the jurisdiction of local tribunals for wrongful acts committed by him while using local highways. It now begins to appear, from decisions such as that of the Supreme Court of Colorado in the case of *Carlson* v. *District Court of the City and County of Denver*,[2] that most state legislatures, when dealing with the problem of the non-resident driver, overlooked the equally vexatious problem of how to treat with the resident driver who leaves the state after an accident but before jurisdiction can be acquired over him or his property.

The case in question arose out of a collision in Colorado between automobiles operated by one Fodor and one Carlson. Carlson's car bore Illinois license plates at the time. Fodor filed suit in Colorado against Carlson and undertook to secure jurisdiction by serving summons on the Secretary of State of Colorado pursuant to a typical statute on the subject.[3] He alleged that Carlson was a non-resident at the time of the accident, being then a resident of New York. Notice to Carlson was completed by sending him a registered article for which Fodor obtained Carlson's signed receipt. Upon Fodor's affidavit as to these facts, a continuance for the purpose of taking evidence and for the entry of a default judgment was granted. Carlson then appeared specially and moved to quash the service, offering an affidavit to the effect that he was a resident of Colorado on the date of the accident and had remained such until six months thereafter when he moved to New York to accept the pastorate of a church. He explained the use of foreign license plates by declaring that he had moved to Colorado from Illinois some five months

[1] 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

[2] 116 Colo. 330, 180 P. (2d) 525 (1947).

[3] Colo. Stats. Ann. 1935, Ch. 16, § 48, and 1937 Supp. § 48(1), provides: "The operation by a non-resident of a motor vehicle on a public highway in this state shall be deemed equivalent to an appointment by such non-resident of the secretary of state to be his or its true and lawful attorney, upon whom may be served all lawful civil process in any action or proceedings against him or it, growing out of any accident or collision in which such non-resident may be involved while operating a motor vehicle on such public highway. . . ."

before the accident but had neglected to purchase local plates as his work was such that he might be required to leave Colorado at any time. Carlson's motion was denied and he was ordered to answer the complaint. He then filed an original proceeding for a writ of prohibition in the Colorado Supreme Court, which court held that he was not subject to substituted service in the fashion indicated because the statute applied only to drivers who were non-residents at the time the cause of action arose. The writ of prohibition was, accordingly, granted.

The problem is not entirely a new one, but the decision serves to re-emphasize a weakness to be found in the statutes of most states, including that of Illinois,[4] where a similar result would probably have to be reached if and when the occasion arises. As these statutes relate to non-resident drivers only, they leave injured persons without a local remedy against those who, at the time the cause of action accrues, are residents of the state in which the accident or collision occurs but who subsequently abandon residence before jurisdiction is acquired and thereafter remain outside the state. The purpose supporting the constitutionality of such statutes as a proper exercise of the police power against non-residents because necessary to provide for a speedy adjudication of the rights of the parties[5] is defeated where local wrongdoers are able to remove themselves from the situs subsequent to the accident and thereby defeat the acquisition of jurisdiction.

To illustrate the inadequacy of such statutes, reference may be made not only to the instant case but also to decisions like that in *Berger* v. *Superior Court in and for Yuba County*[6] where the defendant, stationed in California during the war years, was involved in a highway accident one month before his discharge from service. He returned to his original domicile after his discharge and substituted service was held improper, prohibition being granted on the ground that he was not within the purview of the California Vehicle Code.[7] Similar results have been obtained in Iowa,[8] the District of Columbia,[9] and in North Dakota.[10] A

[4] Ill. Rev. Stat. 1947, Ch. 95½, § 23, is practically identical with the Colorado statute referred to in note 3, ante.

[5] See Pawloski v. Hess, 253 Mass. 478, 149 N. E. 122 (1925), affirmed in 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

[6] 79 Cal. App. (2d) 425, 179 P. (2d) 600 (1947).

[7] Deering, Cal. Vehicle Code, § 404.

[8] Welsh v. Ruopp, 228 Iowa 70, 289 N. W. 760 (1940).

[9] In Wood v. White, 68 App. D. C. 341, 97 F. (2d) 646 (1938), the court held that D. C. Code, Tit. 40, § 403, could not be extended to include residents who become non-residents. See also Suit v. Shailer, 18 F. Supp. 568 (1937), where it was held that Md. Ann. Code 1939, Art. 56, § 167, did not apply to non-residents who temporarily reside in Maryland for more than three months in any one year.

[10] Northwestern Mortgage & Security Co. v. Noel Const. Co., 71 N. D. 256, 300 N. W. 28 (1941).

decision in the last-mentioned jurisdiction furnishes an extreme demonstration of the inefficacy of the general type of statute for there the defendant became involved in a collision in North Dakota, his domicile for thirty years, while driving to Washington to establish a new domicile. Service on him through the local commissioner of insurance was held invalid as defendant was treated as still being a resident at the time of the collision.[11] The evident obstruction to justice in such cases lies not in the construction given to the statutes by the courts but rather with the law-making bodies who have failed to perceive one danger while correcting another.

A small number of jurisdictions, aware of these shortcomings, have enacted legislation which seems to solve the problem. They have enlarged the scope of their statutes so as to permit substituted service upon one who, whether resident or not, uses the highways of the state and thereby appoints some suitable public official as his true and lawful attorney for purpose of service with respect to all claims growing out of the use of the highway. In Ohio, for example, the injured person's remedy is protected by a statute which specifically includes resident drivers who become non-residents after the accident.[12] The Pennsylvania provision[13] is much like that in Ohio, but the one in Montana has been made applicable to "any person who operates a vehicle on a public way."[14] Perhaps the most comprehensive statute was one possessed by New York which not only applied to residents who subsequently became non-residents but declared that absence for thirty days, whether intended to be temporary or permanent, was sufficient to justify substituted service.[15]

[11] See note 10, ante.

[12] Page Ohio Gen. Code Ann., Vol. 4-A, § 6308-5, provides: "This act shall be construed to extend the right of service of process upon non-residents and upon residents who subsequently become non-residents or who conceal their whereabouts. . . ." The statute was held constitutional in Hendershot v. Ferkel, 144 Ohio St. 112, 56 N. E. (2d) 205 (1944), where defendant, residing in Ohio at the time of and for one and one-half years after the accident, subsequently moved to California. Service on the Secretary of State of Ohio was held sufficient to confer jurisdiction.

[13] Purdon's Pa. Stat. Ann. 1931, App. to Rules of Civil Procedure, Rule 2077, provides that the rules relating to non-resident defendants shall apply to "actions as to which the laws of this Commonwealth authorize service of process upon a non-resident or a resident who becomes a non-resident or who conceals his whereabouts." See also McCall v. Gates, 354 Pa. St. 158, 47 A. (2d) 211 (1946).

[14] Mont. Rev. Code 1936, App. Vol. 1, § 1760.13. Held constitutional and applicable in State ex rel. Thompson v. District Court of Fourth Judicial Dist., 108 Mont. 362, 91 P. (2d) 422 (1939), a suit against a Montana resident who left the state two weeks after the accident.

[15] Thompson's Cons. Laws N. Y. 1939, Vehicle & Traffic Law, § 52a, declares: "The operation by a resident of a motor vehicle on a public highway in this state . . . shall, in all cases where such resident shall have removed from this state, prior to the service of legal process upon him . . . and shall have been absent therefrom for thirty days continuously, be deemed equivalent to an appointment by such resident of the Secretary of State to be his true and lawful attorney.

The few cases which have arisen thereunder clearly disclose the beneficial effects of so complete and adequate a law.[16]

While none of these last-mentioned statutes have faced constitutional tests before the United States Supreme Court as yet, there would seem to be as much justification for upholding such measures when applied to residents who later become non-residents as there is for enforcing the same against those who are non-residents at the time of the accident. If a foreign corporation licensed to do business in the state may not cancel authority given for service on an agent merely by surrendering its license, at least as to acts done while there,[17] there seems little reason to treat the resident who withdraws from the state in any different light. Granted that differences exist between artificial persons and human beings and that to apply such a rule to every transaction within the state might transcend constitutional limitations on due process, still the recognition already accorded to the proposition that, in the public interest, the state "may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use the highways,"[18] should warrant different treatment in highway accident cases. Admittedly such a statute, being in derogation of the common law, would have to be construed strictly,[19] but that fact does not militate against its constitutionality. Moreover, from the standpoint of equal protection of the laws, it should pass muster for it puts the resident who stays at home, the foreigner who temporarily comes within the state, and the resident who flees therefrom, in the same sphere, *i.e.* each being made amenable within the state for acts done while there.

As no conceivable constitutional objection exists, it would seem not only proper but advisable for most state legislatures to re-examine their vehicle codes in order to cover a marked deficiency in existing statutes.

J. C. GREGORY

. . ." N. Y. Laws 1941, Ch. 248, added the provision: "Whether such absence is intended to be temporary or permanent." For some unexplained reason, the N. Y. legislature, at the time it added such amendment, also repealed the major provision.

[16] McNally v. Howard, 45 N. Y. S. (2d) 7 (1943); Reed v. Lombardi, 181 Misc. 805, 44 N. Y. S. (2d) 382 (1943); Marano v. Finn, 155 Misc. 793, 281 N. Y. S. 440 (1935).

[17] In general, see Fletcher, Cyc. Corp., Perm. Ed., Vol. 18, § 8762.

[18] Hess v. Pawloski, 274 U. S. 352 at 355, 47 S. Ct. 632, 71 L. Ed. 1091 at 1094 (1927).

[19] See, for example, Brauer Machine & Supply Co. v. Parkhill Truck Co., 383 Ill. 569, 50 N. E. (2d) 836 (1943), confining the application of the Illinois statute to accidents occurring on the highway. Further limitations may be observed in Rose v. Gisi, 139 Neb. 593, 298 N. W. 333 (1941); Balter v. Webner, 175 Misc. 184, 23 N. Y. S. (2d) 918 (1940); Haughey v. Mineola Garage, 174 Misc. 332, 20 N. Y. S. (2d) 857 (1940); Hendershot v. Ferkel, 144 Ohio St. 112, 56 N. E. (2d) 205 (1944); Williams v. Meredith, 326 Pa. St. 570, 192 A. 924 (1937).

CIVIL PRACTICE ACT CASES

JUDGMENT—RENDITION, FORM AND REQUISITES IN GENERAL—WHETHER MORE THAN ONE JUDGMENT MAY BE RENDERED IN THE SAME CASE AGAINST SEVERAL DEFENDANTS SUED AS JOINT TORT-FEASORS—The legal effect of a verdict purporting to apportion damages between joint tort-feasors was considered by the Appellate Court of Illinois for the First District in the recent case of *Stoewsand* v. *Checker Taxi Company.*[1] The plaintiff there sued a taxicab company and a municipality for bodily injuries sustained when the cab in which she was a passenger struck a hole in a city street. The trial court submitted several customary optional forms of verdict to the jury and the parties stipulated that, upon return of a sealed verdict, the jurors were to be permitted to separate and polling of the jury was waived. When court reconvened, the sealed envelope containing the verdict was opened and therein was found two separate verdicts by which the jury declared each defendant to be guilty and assessed the plaintiff's damages at the same figure, to-wit: $10,000.00. The envelope also contained a single joint verdict finding both defendants guilty and assessing damages at $20,000.00, but this form was not signed. Separate judgments were entered on the first two verdicts in favor of plaintiff and against each defendant. The taxicab company filed notice of appeal from the judgment so entered and the city joined therein. Pending the appeal, plaintiff settled with the taxicab company and executed a covenant not to sue it, but the city nevertheless continued with its appeal. The judgment was reversed and the cause remanded for a new trial when the reviewing court sustained appellant's contention that Section 50 of the Illinois Civil Practice Act[2] had not in any way modified the common-law rule that there can be no apportionment of damages between joint tort-feasors.[3]

That rule has been so widely adopted and so rarely challenged in this country that it has become almost axiomatic.[4] Plaintiff, admitting the

[1] 331 Ill. App. 192, 73 N. E. (2d) 4 (1947).

[2] Ill. Rev. Stat. 1947, Ch. 110, § 174.

[3] Humason v. Michigan Central R. Co., 259 Ill. 462, 102 N. E. 793 (1913); Pecararo v. Halberg, 246 Ill. 95, 92 N. E. 600 (1910).

[4] See Southwest Gas & Electric Co. v. Godfrey, 178 Ark. 103, 10 S. W. (2d) 894 (1928); Kerrison v. Unger, 135 Cal. App. 607, 27 P. (2d) 927 (1934); Jiannetti v. National Fire Ins. Co. of Hartford, Conn., 277 Mass. 434, 178 N. E. 640 (1931); Begin v. Liederbach Bus Co., 167 Minn. 84, 208 N. W. 546 (1926); Neal v. Curtis & Co., 328 Mo. 389, 41 S. W. (2d) 543 (1931); Melosh v. Public Service Ry. Co., 4 N. J. Misc. 361, 132 A. 666 (1926); Klepper v. Seymour House Corp. of Ogdenburg, 246 N. Y. 85, 158 N. E. 29, 62 A. L. R. 955 (1927), reversing 218 App. Div. 686, 218 N. Y. S. 476 (1926); Cain v. Quannah Light & Ice Co., 131 Okla. 25,

general existence of such a rule, argued that the pertinent section of the Civil Practice Act had modified the common-law rule since it permitted the entry of separate judgments in the same case. In that connection, plaintiff relied on *Shaw* v. *Courtney*.[5] In that case, the plaintiff had filed a two-count complaint charging assault and battery and also unlawful imprisonment against several defendants. The testimony showed that all of the defendants were not guilty of all of the same wrongful acts. The jury returned separate verdicts as to the several defendants and separate judgments for varying amounts were entered thereon. The Appellate Court reversed these judgments, believing that the verdicts on which they were based were against the manifest weight of the evidence. The Illinois Supreme Court affirmed on the ground that the Appellate Court decision, whether treated as one involving purely a question of fact or a mixed question of fact and law, was binding on it.[6] It did, however, admonish that this "opinion should not be considered as giving sanction to or disapproval of any of the questions of law considered"[7] by the Appellate Court. It may be inferred that, if the Illinois Supreme Court had the question of apportionment of damages between joint tort-feasors properly before it, the court would have reversed as it had done on prior occasions before the adoption of the Civil Practice Act.[8] That case cannot, therefore, be considered as valid authority for the proposition that Section 50 of the Civil Practice Act has modified or relaxed the common-law rule in this respect.

The provision in question was adopted, without substantial modification, from a New Jersey statute which in turn had borrowed from an English provision.[9] In each of these jurisdictions, subsequent to the adoption of the reformed procedure, cases have held that no change has been made in the common-law rule regarding the nature of the liability of joint tort-feasors.[10] While the language of Section 50 of the Illinois

267 P. 641 (1928); Gill v. Selling, 126 Ore. 584, 270 P. 411, 58 A. L. R. 1556 (1928); McShea v. McKenna, 95 Pa. Super. 338 (1930); Gonsalves v. Baptiste, 133 A. (R. I.) 439 (1926); Mooney v. McCarthy, 107 Vt. 425, 181 A. 117 (1935); New River and Pocahontas Consol. Coal Co. v. Eary, 115 W. Va. 46, 174 S. E. 573 (1934).

[5] 317 Ill. App. 422, 46 N. E. (2d) 170 (1943), affirmed in 385 Ill. 559, 53 N. E. (2d) 432 (1944). But see criticism thereof in 21 CHICAGO-KENT LAW REVIEW 249.

[6] Ill. Rev. Stat. 1947, Ch. 110, §§ 199(2) and 216(3)(b).

[7] 385 Ill. 559 at 565, 53 N. E. (2d) 432 at 435.

[8] See cases cited in note 3, ante.

[9] Ill. Civ. Prac. Act Anno. (Foundation Press, Chicago, 1933), p. 122.

[10] Tricoli v. Centalanza, 100 N. J. Law 231, 126 A. 214 (1924); Walder v. Manahan, 21 N. J. Misc. 1, 29 A. (2d) 395 (1942); Owens v. Cerullo, 9 N. J. Misc. 776, 155 A. 759 (1931). The English case of Greenlands, Ltd. v. Wilmshurst, [1913] 3 K. B. 507, particularly p. 530, is especially applicable although it was reversed on other grounds: [1916] 2 A. C. 15.

act authorizes the use of separate verdicts and expressly indicates that "more than one judgment may be rendered in the same cause,"[11] it would seem clear that such language is intended to be limited to cases wherein the plaintiff is pursuing independent claims against several defendants but has joined them in one action for convenience of proof, in which case the use of separate verdicts[12] and of separate judgments is as much an aid to convenience as is the right to order a severance or a consolidation.[13] Decisions from other jurisdictions with apparently contrary holdings[14] turn on the fact that in each of them certain of the joined defendants were found to be subject to liability for punitive damages, hence it was regarded as proper to take separate verdicts against them for the purpose of ascertaining the amount of such additional penalty.[15]

The pleadings in *Shaw* v. *Courtney*,[16] and also in the instant case, reveal that the plaintiff was not pursuing independent causes of action which had been joined for convenience of proof, but rather had elected to treat the liability of the defendants as joint. The instant case, therefore, has the effect of overruling the earlier decision and correcting an oversight therein. It might not have done so had the plaintiff therein elected to sue the defendants separately, for the wrongs committed were not clearly joint ones and the plaintiff might have sued either even though the negligence of the one sued would not have produced damage without the concurrence of the act of the other.[17] When plaintiff did join both, the jury was obliged, if it felt that both defendants were equally guilty, to render one joint verdict against them so as not to prevent the plaintiff from having execution against both, or either, for the full amount of the damages awarded.[18] Inasmuch as separate verdicts were given, the error could have been avoided had the trial court refused to accept the

[11] Ill. Rev. Stat. 1947, Ch. 110, § 174(1).

[12] Ibid., Ch. 110, § 192(2).

[13] Ibid., Ch. 110, § 175.

[14] Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264 (1908); Edquest v. Tripp & Dragstedt, 93 Mont. 446, 19 P. (2d) 637 (1933); Latasa v. Aron, 109 N. Y. S. 744 (1908); McCurdy v. Hughes, 63 N. D. 435, 248 N. W. 512 (1933); Mauk v. Brundage. 68 Ohio St. 89, 67 N. E. 152 (1903); Johnson v. Atlantic Coast Line R. Co., 142 S. C. 125, 140 S. E. 443 (1927); Waggoner v. Wyatt, 42 Tex. Civ. App. 75, 94 S. W. 1076 (1906).

[15] The rule in Illinois is illustrated by Becker v. Dupree, 75 Ill. 167 (1874).

[16] See note 5, ante. The cases there relied on all involved the apportionment of punitive damages and came from jurisdictions which either expressly permit or require the use of separate verdicts in such situations: see note 14, ante.

[17] Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N. E. 553 (1898); Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481, 25 N. E. 799 (1890). See also Cooley, Torts, 4th Ed., Vol. 1, § 81 et seq.

[18] Postal Telegraph Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136 (1907).

same and instructed the jury as to the proper performance of its duty.[19] Since the error was not corrected in the trial court, the decision in the instant case achieves a salutary result by removing the uncertainty created by the earlier decision and by restoring a rule supported by six centuries of unbroken authority.

C. J. PRATT

[19] Such was no longer possible, of course, after the jury had been allowed to separate pursuant to the stipulation: Brownell Machinery Co. v. Walworth, 193 Ill. App. 23 (1915), abst. opinion; Wickizer-McClure Co. v. Bermingham & Seaman Co., 151 Ill. App. 540 (1909).

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DISCUSSION OF RECENT DECISIONS

INDICTMENT AND INFORMATION—MOTION TO QUASH OR DISMISS, AND DEMURRER—EFFECT OF PRESENCE OF UNAUTHORIZED PERSONS IN GRAND JURY ROOM DURING INVESTIGATION OF CHARGE AGAINST ACCUSED—In *People* v. *Minet*,[1] the Court of Appeals of New York had occasion to consider the problem of whether a district attorney may call two or more witnesses before the grand jury at the same time. The defendant therein had been indicted for the rape of one Camille Harris, a female under the

[1] 296 N. Y. 315, 73 N. E. (2d) 529 (1947).

age of eighteen years. It appeared that when the victim was subpoenaed to appear before the grand jury she informed the district attorney that she was "somewhat afraid or nervous." The district attorney, with the approbation of the grand jury, allowed the girl's older sister to enter the grand jury room with her and they were both sworn as witnesses and both testified. The district attorney conceded, however, that the sister had "nothing of probative value to add to the People's case." After indictment found, defendant moved to set the same aside on the statutory ground that an unauthorized person had been permitted to be present in the grand jury room while the charge embraced in the indictment was under consideration.[2] The trial judge ruled that the motion had no merit and the defendant was subsequently tried and convicted. He prosecuted an appeal to the New York Supreme Court, Appellate Division, urging error in refusing to entertain his motion to dismiss the indictment. That court, in affirming the ruling, held that unless the defendant could show actual prejudice to his substantial rights a mere departure from the procedure prescribed by the statute would not render the indictment invalid.[3] On further appeal, the highest court in New York reversed the judgment and dismissed the indictment, holding that the presence of two witnesses in the grand jury room at the same time was error and that the decision should not be made to depend on whether or not the defendant was actually prejudiced thereby. The court also stated that if prejudice to the defendant was to be a material determinant it was up to the legislature to so provide.

The question of who may be admitted to the grand jury room and the effect of the presence of unauthorized persons there while the jury is investigating the charge against the accused is one which, from early common law days,[4] has been a subject of controversy. The cases all seem to agree that, as a general proposition, no person except the grand jurors should be present while the grand jury is deliberating or voting,[5] but there is a decided difference of opinion as to the effect of the presence of unauthorized persons while the charge is merely being investigated. It is at this point that the question of prejudice to the defendant and

[2] N. Y. Code of Crim. Pro., § 315, provides in part: ". . . The indictment must be set aside by the court in which the defendant is arraigned, and upon his motion, in either of the following cases . . . (2) When a person has been permitted to be present during the session of the grand jury, while the charge embraced in the indictment was under consideration. . . ."

[3] People v. Minet, 271 App. Div. 345, 66 N. Y. S. (2d) 391 (1946).

[4] See, for example, a discussion thereof in Earl of Shaftesbury's Trial, 8 How. St. Tr. 759 at 771 (1681).

[5] Gitchell v. People, 146 Ill. 175, 33 N. E. 757 (1893); State v. Wetzel, 75 W. Va. 7, 83 S. E. 68, 7 Ann. Cas. 1918A 1074 (1914); People v. Tru-Sport Pub. Co., 160 Misc. 628, 291 N. Y. S. 449 (1936).

his substantial rights becomes important. One group of decisions indicate that the mere presence of an unauthorized person is sufficient to render an indictment found under such circumstances invalid.[6] On the other hand, it has also been held by an equally substantial number of courts, including those of Illinois,[7] that the presence of an unauthorized person in the grand jury room during the investigatory stage is insufficient to vitiate an indictment unless the accused can show that he was thereby prejudiced.[8] Upon such showing, of course, the indictment will be, and

[6] Presence of the persons hereinafter indicated was sufficient to vitiate the indictments returned in United States v. Amazon Industrial Chemical Corp., 55 F. (2d) 254 (1931); United States v. Heinze, 177 F. 770 (1910), expert accountant; United States v. Virginia-Carolina Chemical Co., 163 F. 66 (1908), special assistant to Attorney General; United States v. Rosenthal, 121 F. 862 (1903), same; United States v. Edgerton, 80 F. 374 (1897), witness; United States v. Kilpatrick, 16 F. 765 (1883), examiner from Department of Justice; Husband v. Superior Court, 128 Cal. App. 444, 17 P. (2d) 764 (1933), auditor; People v. Brown, 81 Cal. App. 226, 253 P. 735 (1927); Hicks v. State, 97 Fla. 199, 120 So. 330 (1929), privately retained counsel; Commonwealth v. Berry, 29 Ky. L. R. 234, 92 S. W. 936 (1906), stenographer; Coblentz v. State, 164 Md. 558, 166 A. 45, 88 A. L. R. 886 (1933), attorney who represented prosecuting witness in a civil case; In re Lebowitch, 235 Mass. 357, 126 N. E. 831 (1920), all witnesses present at same time; Commonwealth v. Harris, 231 Mass. 584, 121 N. E. 409 (1919), police officers and others; State v. Bowman, 90 Me. 363, 38 A. 331, 60 Am. St. Rep. 266 (1897), stenographer; State v. Ernster, 147 Minn. 81, 179 N. W. 640 (1920), committee from a former grand jury; State v. Slocum, 111 Minn. 328, 126 N. W. 1096 (1919), attorney of grand jury's choice; State v. Salmon, 216 Mo. 466, 115 S. W. 1106 (1909), stenographer and witness; State v. Johnson, 55 N. D. 437, 214 N. W. 39 (1927), assistant prosecutor; People v. Dorsey, 176 Misc. 932, 29 N. Y. S. (2d) 637 (1941), attorney general; People v. Tru-Sport Pub. Co., 160 Misc. 628, 291 N. Y. S. 449 (1936), same; Viers v. State, 10 Okla. Cr. 28, 134 P. 80 (1913), special assistant county attorney; Hartgraves v. State, 5 Okla. Cr. 266, 114 P. 343, 33 L. R. A. (N. S.) 568, Ann. Cas. 1912D 180 (1911), privately employed counsel conducting examination; State v. Maben, 5 Okla. Cr. 581, 114 P. 1122 (1911), special counsel for governor; Meyers v. Second Judicial Dist. Court, 108 Utah 32, 156 P. (2d) 711 (1945); State v. Heaton, 21 Wash. 59, 56 P. 843 (1899), special counsel.

[7] People v. Hartenbower, 208 Ill. App. 465 (1917), affirmed in 283 Ill. 591, 119 N. E. 605 (1918), error dis. 248 U. S. 550, 39 S. Ct. 183, 63 L. Ed. 417 (1919); People v. Munson, 319 Ill. 596, 150 N. E. 280 (1926); People v. Arnold, 248 Ill. 169, 93 N. E. 786 (1911); People v. Strauch, 153 Ill. App. 544 (1910), affirmed in 247 Ill. 220, 93 N. E. 126 (1910); People v. Wiggins, 231 Ill. App. 467 (1923).

[8] Presence of the persons hereinafter indicated was insufficient in Jones v. State, 150 Ala. 54, 43 So. 179 (1907), attorney present at request of judge; Kinnebrew v. State, 132 Ala. 8, 31 So. 567 (1902), attorney under invalid appointment; Richards v. State, 108 Ark. 87, 157 S. W. 141, Ann. Cas. 1915B 231 (1913), stenographer; Tiner v. State, 109 Ark. 138, 158 S. W. 1087 (1913), privately employed counsel; Bennet v. State, 62 Ark. 516, 36 S. W. 947 (1896), substitute attorney for prosecutor; State v. Bates, 148 Ind. 610, 48 N. E. 2 (1897), stenographer; Courtney v. State, 5 Ind. App. 356, 32 N. E. 335 (1892), stenographer; State v. Tyler, 122 Iowa 125, 97 N. W. 983 (1904), attorney; State v. Wood, 112 Iowa 484, 84 N. W. 503 (1900), father of witness; State v. Louviere, 165 La. 718, 115 So. 914 (1928), stenographer; LeBarron v. State, 107 Miss. 663, 65 So. 648 (1914), two prosecuting attorneys; State v. Bacon, 77 Miss. 366, 27 So. 563 (1900), mere strangers; State v. Brewer, 180 N. C. 716, 104 S. E. 655 (1920), witness who was member of the grand jury; State v. Bolitho, 103 N. J. Law 246, 136 A. 164 (1927), affirmed in 104 N. J. Law 446, 146 A. 927 (1927), interpreter; State v. Justus, 11 Ore. 178, 8 P. 337 (1883); Commonwealth v. Brownmiller, 141 Pa. Super. 107 14 A. (2) 807 (1940), special assistant district attorney and stenographer; Sadler v. State, 124

ought to be quashed.[9]

The problem is also somewhat complicated where statutes exist forbidding the presence of unauthorized persons in the grand jury room when a charge is "under consideration." The court in the instant case interpreted that term to include the period of the taking of the testimony as well as later stages of grand jury procedure.[10] In contrast, a somewhat similar Texas statute was construed in *Johnson* v. *State*[11] to be limited to the act of discussing reasons for and against the finding of an indictment rather than to the mere examination of witnesses. As "consideration" and "deliberation" are synonymous terms, it would seem that the Texas interpretation is the more reasonable one. Inasmuch as the "secrecy of proceedings by the grand jury is for the benefit of the state and not of the defendant,"[12] it is difficult to see why the defendant should be allowed to complain of a mere technical violation of secrecy in any but the deliberative stages unless he can show that he was in some way prejudiced by such violation.

While Illinois and a number of jurisdictions which require proof of prejudice do not have statutes like the one interpreted in the instant case, it would seem that, even where such statutes exist, courts could arrive at the same conclusion by a less dogmatic approach so as to require more than a mere technical violation to render an indictment invalid. Relief has been denied elsewhere, in cases very similar to the instant one, where no statute exists and the defendant cannot show actual prejudice. In *People* v. *Arnold,*[13] for example, the defendant was accused of rape. The prosecuting witness, aged 15, was somewhat timid and her father was allowed to be present in the grand jury room while the girl identified some clothing. The Illinois court, while recognizing the rule that one witness should never be permitted to be present in the grand

Tenn. 50, 136 S. W. 430, 25 Ann. Cas. 1912D 976 (1911), grand jury officer; Johnson v. State, 131 Tex. Cr. 23, 95 S. W. (2d) 697 (1936); Tinker v. State, 95 Tex. Cr. 143, 253 S. W. 531 (1923), sheriff; Porter v. State, 72 Tex. Cr. 71, 160 S. W. 1194 (1913), bailiff acting as stenographer; State v. Brewster, 70 Vt. 341, 40 A. 1037, 42 L. R. A. 444 (1898), stenographer.

[9] Prejudice was found in State v. Bower, 191 Iowa 713, 183 N. W. 322 (1911), more than one witness; State v. Will, 97 Iowa 58, 65 N. W. 1010 (1896), judge present; Sanders v. State, 198 Miss. 587, 22 So. (2d) 500 (1945), judge present; Herrington v. State, 98 Miss. 410, 53 So. 783 (1911), sheriff.

[10] That interpretation had also been attained in People v. Tru-Sport Pub. Co., 160 Misc. 628, 291 N. Y. S. 449 (1936), where the court said "under consideration" referred to the entire grand jury proceeding so as to include the period in which evidence was received as well as other parts of the transaction of business.

[11] 131 Tex. Cr. 23, 95 S. W. (2d) 697 (1936).

[12] State v. Wood, 112 Iowa 484 at 485, 84 N. W. 503 (1900).

[13] 248 Ill. 169, 93 N. E. 786 (1911).

jury room during the examination of another, found that there was practically no examination of the witnesses in the presence of each other and, absent any showing of prejudice, refused to quash the indictment. Similarly, in *State* v. *Wood*,[14] where the defendant was held for perjury, the father of the prosecuting witness, she being "nervous and fearful," was allowed to accompany her into the grand jury room while she testified. Only the girl testified but both father and daughter were sworn as witnesses. The Iowa Supreme Court there concerned, upholding the indictment, declared that "the presence of one who was required to go before the grand jury as a witness, while another was giving testimony, is not sufficient ground for setting aside the indictment, where no other showing of prejudice to defendant is made."[15]

It must be acknowledged that the holding in the instant case is correct in the light of the two assumptions made by the New York court, to-wit: (1) that the mere presence of unauthorized persons is deadly error, and (2) that such rule applies to any stage of grand jury procedure, but there is good reason to believe that such assumptions were neither necessary nor reasonable, so the ultimate outcome of the case is not to be commended.

J. W. PUGH

INSURANCE—PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION—WHETHER OR NOT INSURER MAY RECOVER AMOUNTS PAID TO INSURED WHEN SUBROGATION HAS BEEN PREVENTED BY GENERAL RELEASE GIVEN TO TORT-FEASOR—Under a set of facts novel to this state, the Appellate Court of Illinois for the First District has clarified the insurer's right of subrogation by its decision in the recent case of *Inter Insurance Exchange of the Chicago Motor Club* v. *Andersen*.[1] In that case, a car driven by the insured, one Andersen, was involved in a collision with a car driven by one Kuntz, in which accident Andersen suffered both personal injury and damage to his automobile. Andersen carried collision insurance with plaintiff, so he submitted an estimate of the damage and plaintiff paid him the estimated amount less an amount deductible under the policy. Kuntz, in the meantime had been arrested for reckless driving. At a hearing on this charge, the judge recommended that Kuntz settle with Andersen and this was done, Andersen signing

[14] 112 Iowa 484, 84 N. W. 503 (1900).

[15] 112 Iowa 484 at 486, 84 N. W. 503 at 504.

[1] 331 Ill. App. 250, 73 N. E. (2d) 12 (1947). The court distinguished the instant case from C. B. & Q. R. R. Co. v. Emmons, 42 Ill. App. 138 (1891), by pointing out that the issues were not identical.

a release prepared by Kuntz's attorney. Andersen's insurer was aware of the fact that he had collected in this manner, but was not aware of the release. Kuntz, on the other hand, knew that the insurer had already settled with Andersen for the property damage claim. The insurer thereafter instituted subrogation proceedings in Andersen's name but was met by the defense of the release given as aforesaid. The insurer then moved that it be substituted as plaintiff in the suit and that Andersen be made an additional party defendant. Upon such amendment, the court rendered judgment against both defendants for the amount paid on the policy. On appeal, the judgment was affirmed as to Andersen but reversed as to Kuntz. That conclusion was reached on the basis that, in a case such as this, the insured rather than a stranger to the insurance contract must be conscious of the duties arising out of his relationship with the insurer and must, therefore, bear the onus of protecting the rights of such insurer.[2]

In arriving at its decision that the release barred the insurer's right of recovery against the wrongdoer the court adopted the reasoning of the Supreme Court of Pennsylvania in the case of *Illinois Automobile Insurance Exchange* v. *Braun*.[3] That ruling is, however, definitely a minority view for the general rule might be stated to be that if a release is procured from the insured by the wrongdoer with the knowledge that the insurer had already made a settlement with the insured, such release is no bar to an action by the subrogee-insurer against the wrongdoer.[4] That rule applies with special force, as here, where the tort-feasor has settled with the insured for less than the total amount of the loss.[5] Some of the decisions supporting the majority view are based upon the limited intent of the insured in giving the release,[6] others on the doctrine

[2] It might be noted that any recovery by way of subrogation represents an unexpected windfall to the insurer for premiums are usually calculated on an indemnity basis. If subrogation returns enter indirectly into the computation of premium rates, they constitute a relatively inconsequential factor and are not specifically included by name among the many factors considered. See Huebner, Property Insurance, pp. 332-9.

[3] 280 Pa. St. 550, 124 A. 691, 36 A. L. R. 1262 (1924).

[4] James v. Emmco Ins. Co., 71 Ga. App. 196, 30 S. E. (2d) 361 (1944); American Automobile Fire Ins. Co. v. Speiker, 97 Ind. App. 533, 187 N. E. 355 (1933); City of New York Ins. Co. v. Tice, 159 Kan. 176, 152 P. (2d) 836, 157 A. L. R. 1233 (1944); Wolverine Ins. Co. v. Klomparens, 273 Mich. 493, 263 N. W. 724 (1935); Powell & Powell v. Wake Water Co., 171 N. C. 290, 88 S. E. 426 (1916); Camden Fire Ins. Ass'n. v. Prezioso. 93 N. J. Eq. 318, 116 A. 694 (1922); Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60, 55 A. L. R. 921 (1927). See also Joyce, The Law of Insurance, 2d Ed., Vol. 5, § 3544, p. 5888; Vance, Insurance, § 175; Richards, The Law of Insurance, 4th Ed. § 57, p. 87.

[5] Fire Association v. Wells, 84 N. J. Eq. 484, 94 A. 619 (1915).

[6] The insured in the instant case also attempted to prove that he intended only a limited release, but the court found that the release was general and contained no ambiguity, hence testimony tending to change its tenor was inadmissible under the parol evidence rule.

that divisible causes of action were involved,[7] but some go to the length of holding that the insured is without power to defeat the rights of the insurer or insist that any such release is a fraud on the insurer's rights, hence void. If, on the other hand, the tort-feasor obtains a full release from the insured without notice of the insurer's claim to subrogation, the insurer's claim is effectively barred.[8]

The other aspect of the decision in the instant case required the insured to return to the insurer the entire amount paid by it. Again the court followed the Pennsylvania decision already referred to but which expresses a minority view on this point also. Courts which require reimbursement of the insurer generally limit the recovery against the insured to an amount by which the sum received from the wrongdoer plus that paid under the insurance policy exceeds the loss and the expenses incurred by the insured in realizing on the claim.[9] Decisions of that character appear to be based upon the reasoning that the doctrine of subrogation is founded on the principle that no one should be paid twice for the same loss but that, as a necessary corollary, the insured should be permitted to retain both the insurance money and the sums recovered from the wrongdoer until he has been paid in full.

If that reasoning were applied to the instant case, and accepting the insured's contention that the amounts received by him from whatever source reimbursed him only for the actual property damage and personal injuries sustained, it will be seen that he was not being unjustly enriched. But those courts which allow the insured to retain all amounts received up to the point where he has recovered only the amount of his loss plus expenses also generally hold that the release given by the insured to the tort-feasor is no bar to the subrogation claim. That fact has undoubtedly influenced the tenor of the decisions on this point for those courts which treat a release given by the insured to the tort-feasor as a bar to the insurer's right to subrogation would logically hold that, in such cases,

[7] A note on the severability of a cause of action appears in 24 CHICAGO-KENT LAW REVIEW 183.

[8] Kidd v. Hillman, 14 Cal. App. (2d) 507, 58 P. (2d) 662 (1936); American Auto Ins. Co. v. Clark, 122 Kan. 445, 252 P. 215 (1927). Of course, if the insured releases the tort-feasor before collecting under the policy, liability thereon is destroyed: Farmer v. Union Ins. Co., 146 Miss. 600, 111 So. 584 (1927); Highlands v. Cumberland Valley Farmers' Mut. Ins. Co., 203 Pa. 134, 52 A. 130 (1902).

[9] American Automobile Fire Ins. Co. v. Speiker, 97 Ind. App. 533, 187 N. E. 355 (1933); Shawnee Fire Ins. Co. v. Cosgrove, 85 Kan. 296, 116 P. 819 (1911); Washtenaw Mut. Fire Ins. Co. v. Budd, 208 Mich. 483, 175 N. W. 231 (1919); Camden Fire Ass'n. v. Prezioso, 93 N. J. Eq. 318, 116 A. 694 (1922); Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60, 55 A. L. R. 921 (1927); Camden Fire Ins. Ass'n. v. Missouri K. & T. R. Co., 175 S. W. 816 (Tex. Civ. App., 1915). See also annotations in 36 A. L. R. 1268, 55 A. L. R. 926 and 140 A. L. R. 1246.

the insurer may receive reimbursement from the insured. In either event, the rights of the insurer are protected. Moreover, the cases indicate a strong tendency to put the burden on the insured to show that the amount received from the tort-feasor represents the satisfaction of the uninsured claim, rather than the insured one. In the absence of proof so showing, the recovery will be presumed to include the full amount of the insured demand so the insurer may recover the full amount paid on the policy.[10] While it may be said that courts are not in agreement on the exact nature of the insurer's right to subrogation,[11] it is only when the insurer has waived its right that it will be denied recovery from either the insured or the tort-feasor.[12]

The Illinois court has determined that, as between the insured and the tort-feasor, the entire burden of protecting the insurer's right of subrogation rests with the insured. Such a doctrine, while perhaps logical and certain, is not without possible injustice for it compels the insured, who may have acted innocently but imprudently, to bear virtually all the loss while permitting the person responsible for the entire damage to escape the material consequences of his fault. Unless the rule is changed, an insured person who hereafter deals with the tort-feasor without the acquiescence of his insurer must remember that he does so at his peril.

E. B. STROH

LANDLORD AND TENANT—TERMS FOR YEARS—WHETHER TENANT HOLDING OVER AFTER EXPIRATION OF LEASE FOR FRACTION OF A YEAR BECOMES A TENANT FROM MONTH TO MONTH OR YEAR TO YEAR—The Appellate Court of Illinois for the First District, in the recent case of *Heun* v. *Hanson*,[1] had occasion to consider whether holding over upon expiration of a term for less than one year would create a month-to-month tenancy or would amount to a renewal for a like fractional period. The suit was one to recover possession of an apartment occupied by the defendant which had been leased to him for an eleven-month term to expire on April 1st. Defendant remained in possession after the lease

[10] Hayward v. State Farm Mutual Auto Ins. Co., 212 Minn. 500, 4 N. W. (2d) 316, 140 A. L. R. 1236 (1942); Manley v. Montgomery Bus Co., 82 Pa. Super. 530 (1924).

[11] A thorough analysis and criticism of the doctrine of subrogation in insurance law may be found in Langmaid, "Some Recent Subrogation Problems in the Law of Suretyship and Insurance," 47 Harv. L. Rev. 976, particularly p. 987.

[12] Weaver v. N. J. Fidelity & Plate Glass Co., 56 Colo. 112, 136 P. 1180 (1913); Firemen's Ins. Co. v. Georgia Power Co., 181 Ga. 621, 183 S. E. 799 (1936); Leonard v. Bottomley, 210 Wis. 411, 245 N. W. 849 (1933).

[1] 331 Ill. App. 82, 72 N. E. (2d) 703 (1947).

expired, paying the stipulated rental for the ensuing months until the action was brought. Plaintiff, having secured federal authorization,[2] served statutory notice terminating the tenancy as of July 31st and thereafter filed an action in forcible entry and detainer. Consistent with current nisi prius doctrines, the trial court granted plaintiff a judgment for possession on the theory that, because the tenancy provided for in the original lease was for less than one year, the holding over after termination constituted a month-to-month tenancy. That decision, on appeal taken by the tenant, was reversed upon the ground that common law doctrines on the subject had not been changed in this state so that the holding over renewed the term for a like period of eleven months.

For answer to the problem, the court reached back to the earliest reported Illinois case on the subject, that of *Prickett* v. *Ritter*.[3] Like the case at hand, that case involved the character of a holdover term with the landlord seeking to oust the tenant. The original tenancy there involved, however, had been for one month. After a careful review of the English and American authorities, the court in that case affirmed the common law rule that where a tenant remains in possession after expiration of the term, the landlord may elect to hold him for a like period upon similar terms as the original lease.[4] Although the original lease was for one month, and consequently a month-to-month tenancy arose by the holding over, the court did indicate that where the lease is for any period less than a year the holding over would be construed so as to create another term of the same length of time and upon the same terms, both as to the amount of rent and the time of payment, unless there was some act of either party to rebut such an implication.[5] That doctrine was reiterated in *Clapp* v. *Noble*,[6] an action for rent upon holding over after a term of one month, and has been honored at least by repetition, although the more recent cases have involved year-to-year tenancies.[7] The instant case is, therefore, the first which has specifically dealt with the precise problem.

[2] See 50 U. S. C. A., app. § 901 et seq.

[3] 16 Ill. 96 (1854).

[4] In general, see Tiffany, The Law of Real Property, 3d Ed., § 178. Modern English and Canadian developments are traced in Johnson, "Note on Overholding Tenants," 24 Can. Bar Rev. 508 (1946).

[5] See 16 Ill. 96 at 97.

[6] 84 Ill. 62 (1876).

[7] In Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151 (1881), the holding over there concerned was after a five-year term so expressions as to less-than-year tenancies are dicta. See also Weber v. Powers, 213 Ill. 370, 72 N. E. 1070 (1905), and Fredman v. Sutliff & Case Co., 330 Ill. App. 119, 70 N. E. (2d) 222 (1946). A similar result to that in the instant case, on an eleven-month lease, was reached in Smith v. Holt, 193 S. W. (2d) (Tenn. App.) 100 (1945), where the court said:

Certain basic principles, common to all holdover tenancies, are important. "The old, or written, lease is not the contract of the parties for the new term but is only evidence to establish the nature of the implied contract resulting from the holding over of the tenant."[8] The right of election, if the tenant remains in possession upon expiration of the term, is solely the right of the landlord.[9] The tenant having held over, his contrary intent to remain under different terms cannot rebut the legal presumption, but that of the landlord can.[10] Power of attorney in the original lease to confess judgment for rent due cannot be extended for use during the holdover term.[11] For that matter, an option given therein to the tenant to extend the term for several different periods will be deemed exercised, by the holding over, for the shortest period possible.[12]

The theory upon which the plaintiff based his case represents a confusion of these basic principles and seems to stem from a minority view which measures the renewal term by the rental period.[13] That idea is expressed in the Illinois Appellate Court decision in *Schilling* v. *Klein*,[14] although that case seems clearly distinguishable from the general rule on a factual basis.[15] The court there indicated that, as negotiations for a new lease were inconsistent with an election to treat the tenant as holding over on the old terms, his continued payment of rental on a monthly basis created a tenancy from month to month. Much the same rationale was followed in *Stillo* v. *Pellettieri*[16] where the landlord served notice to terminate upon a tenant under a yearly lease but the latter held over and paid the same monthly rental. Again, in *Sherriff* v.

"In such cases of holding over, if the original tenancy was for a year or more, the new or holdover tenancy is from year to year; if the original term was for less than a year, as a month or a quarter, the new tenancy is presumably a periodic tenancy measured by such a period."

[8] See Weber v. Powers, 213 Ill. 370 at 381, 72 N. E. 1070 at 1073 (1905).

[9] Keegan v. Kinnare, 123 Ill. 280, 14 N. E. 14 (1887).

[10] Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151 (1881).

[11] Weber v. Powers, 213 Ill. 370, 72 N. E. 1070 (1905).

[12] Anderson v. Dodsworth, 292 Ill. 335, 127 N. E. 43 (1920).

[13] In Elkins Natl. Bank v. Nefflen, 118 W. Va. 29 at 31, 188 S. E. 750 at 751 (1936), the court stated: "The controlling element in determining this question is the nature of the rent reserved or paid." See also annotation to this case in 108 A. L. R. 1464, listing decisions for California and Michigan.

[14] 41 Ill. App. 209 (1891).

[15] Prior to the expiration of a three-year term, the landlord and tenant commenced negotiations for a new lease which never did ripen into an agreement, but the tenant remained in possession and paid at the old monthly rate for some fifteen additional months.

[16] 173 Ill. App. 104 (1912).

Kromer,[17] where the landlord sued for rent after a claimed abandonment of the premises, the original lease being for four months, the court refused to follow the general rule because the landlord had definitely stated the terms upon which he would permit the tenant to remain; terms which were different from the original lease. These cases do not contradict the holding in the instant case for they regard the landlord's intention as being a controlling factor,[18] the election being solely his. They may, however, easily mislead the unwary into believing that all holdover tenancies for periods of less than a year become tenancies from month to month. In reality, they become such because of a rebuttal of the normal general presumption that the holding over is upon the terms and for the duration of the original demise.[19]

W. O. KROHN

LIFE ESTATES—LEASES BY LIFE TENANTS—WHETHER OR NOT LESSEE OF LIFE TENANT MAY REMOVE PERMANENT STRUCTURES AFFIXED TO DEMISED PREMISES AFTER DEATH OF LIFE TENANT HAS TERMINATED LESSEE'S RIGHT TO POSSESSION—The North Carolina Supreme Court issued a sharp commentary, in the case of *Haywood* v. *Briggs*,[1] on the danger of erecting valuable improvements on land held under lease from a life tenant. The facts there revealed that the intervenors leased two adjoining lots from a life tenant and erected thereon two tobacco auction warehouses covered by a single roof. These structures rested on concrete foundations, were partly floored in concrete, and covered half a city block. Recognizing the possible infirmities of their title, the intervenors, as lessees, had required the life tenant to supply penal bonds approximating the value of the warehouses and conditioned upon the failure of their estate by operation of law or through the death of the life tenant. The lease provided, *inter alia*, that all improvements and fixtures placed on the premises by the lessees should remain their property. It also purported to grant the right of removal thereof within a reasonable time after the termination of the lease whether that event occurred by expiration of time or by act of law. For twenty years, under successive

[17] 232 Ill. App. 589, 149 N. E. 14 (1924).

[18] See Street R. R. Co. v. Morrison etc. Co., 160 Ill. 288, 43 N. E. 393 (1896), where mere verbal notice by an agent of the landlord was regarded as sufficient to rebut the presumption of holding over under like terms for a like period.

[19] The notice given in the instant case was obviously deficient for, while in proper form, it did not comply with Ill. Rev. Stat. 1947, Ch. 80, § 6, in that it was not given at the proper time with reference to the expiration of the holdover term. See Weber v. Powers, 213 Ill. 370, 72 N. E. 1070 (1905); Ball v. Peck, 43 Ill. 482 (1867); Kaylor v. Smith, 229 Ill. App. 140 (1923).

[1] 227 N. C. 108, 41 S. E. (2d) 289 (1947).

leases with the life tenant, the lessees enjoyed exclusive possession. At no time did the remaindermen join with the life tenant in the leases. On the death of the life tenant and while the lessees were still occupying the premises an action was instituted by certain of the remaindermen for partition of the property. The lessees, over objection, were permitted to intervene in this proceeding and they filed pleadings alleging they possessed the right to remove the two tobacco warehouses and other fixtures. They sought permission from the court to remove the buildings and the trial court granted that relief. On appeal by the remaindermen, it was held that it was error to grant such permission inasmuch as the lessees had lost all rights in the structures upon the death of the life tenant, which fact had nullified the lease and all rights resting thereon.

The intervenors admitted the lack of privity between themselves and the remaindermen, but based their claim upon general principles of law relating to trade fixtures. They contended that, under the circumstances of the case, the buildings erected by them came within the definition of trade fixtures and, independent of any express agreement, the structures were stamped with the character of personal property so were removable at the lessees' option.[2] It was not denied that if the buildings were trade fixtures the intervenors could remove them, if such removal could be accomplished without injury to the freehold,[3] but this was clearly not such a case for the structures were large, were based on deep concrete footings, were still in active use twenty years after building, and possessed an indefinite future useful life. Clearly, then, unless the buildings could be considered as personalty between the parties, the structures would ordinarily be regarded as permanent accessions to the freehold.[4]

But the intervenors further argued that, irrespective of contract and aside from whether or not the improvements were trade fixtures, they were entitled to a reasonable period of time after the death of the life tenant to surrender possession and to remove the buildings. In support of this position they relied on the Iowa decision in *Ray* v. *Young*.[5] In that case, after citing the acknowledged majority rule that upon the death of the life tenant the title to real property passes by operation of law to the remaindermen unaffected by any leases or agreement the

[2] Van Ness v. Pacard, 27 U. S. (2 Pet.) 137, 7 L. Ed. 374 (1829).

[3] Olympia Lodge v. Keller, 142 Wash. 93, 252 P. 121, 52 A. L. R. 795 (1927); Pennington v. Black, 261 Ky. 728, 88 S. W. (2d) 969 (1935); Schultz v. Seiler Motor Car Co., 243 Ky. 459, 48 S. W. (2d) 1068 (1932); Davidson v. Crump Mfg. Co., 99 Mich. 501, 58 N. W. 475 (1894).

[4] Belvin v. Raleigh Paper Co., 123 N. C. 138, 31 S. E. 655 (1898).

[5] 160 Iowa 613, 142 N. W. 393, 46 L. R. A. (N. S.) 947, Ann. Cas. 1915D 258 (1913).

life tenant may have made in respect thereto,[6] the court nevertheless said it was "disposed to follow the more equitable rule which allows the lessee of a tenant for life a reasonable time after the death of his lessor to surrender his possession and remove his property."[7]

A careful search of the decisions, however, reveals that the Iowa holding stands alone in opposition to the substantial weight of authority country-wide to the contrary.[8] The ruling therein would be understandable were it supported either by respectable authority or clear legalistic reasoning, but this is not the case. The rule advanced is documented to decisions which totally fail to support the position urged,[9] except for some questionable dicta in the Ohio case of *Haflick* v. *Stober*,[10] and argues for some sort of equitable procedure in such situations to ameliorate what has been designated to be the "absolute legal right of remaindermen."[11] That argument has, however, been ignored in the

[6] For a general discussion of these principles, see 36 C. J. S., Fixtures, § 31, p. 967; 22 Am. Jur., Fixtures, § 61; 6 A. L. R. 1506, and 2 Ann. Cas. 406.

[7] 160 Iowa 613 at 624, 142 N. W. 393 at 398. The court referred to Stewart v. Matheny, 66 Miss. 21, 5 So. 387, 14 Am. St. Rep. 538 (1889), and to Jones v. Shufflin, 45 W. Va. 729, 31 S. E. 975, 72 Am. St. Rep. 848 (1898). Those cases, however, advance the majority rule. The court also said: "The rule that 'the right of a tenant for life to remove a trade fixture is not necessarily lost by the expiration of the term by the death of the life tenant, but he has a reasonable time after the death of the life tenant to surrender possession and remove the fixtures,' is supported by many cases." See 160 Iowa 613 at 622, 142 N. W. 393 at 397. A careful review of the cited authorities, however, reveals that they concern themselves only with such improvements as would clearly constitute fixtures at law. None of the cases support the position of the Iowa court in holding that a garage and repair shop was a trade fixture solely because it was agreed to constitute personalty as between the parties. The Iowa court correctly quoted the rule but erred in concluding that it supported their decision on the facts presented by the case.

[8] No other case supporting the minority rule has been cited by secondary authorities either. See Tiffany, Real Property, 3d Ed., p. 247; 22 Am. Jur., Fixtures, § 61; 36 C. J. S., Fixtures, § 31; and annotations in 109 A. L. R. 1425, 6 A. L. R. 1515, 46 L. R. A. (N. S.) 947, 2 Ann. Cas. 406.

[9] The general rule, set out by these cases, is that where fixtures are of such a character that, in the absence of any contract on the subject, they would constitute a permanent accession to the estate, a tenant for life cannot, by contract, so far bind the remainderman as to authorize their removal by his lessee after termination of the life estate. See Demby v. Parse, 53 Ark. 526, 14 S. W. 899 (1890); Haflick v. Stober, 11 Ohio St. 482 (1860); White v. Arndt, 1 Whart. (Pa.) 91 (1836); Jones v. Shufflin, 45 W. Va. 729, 31 S. E. 975 (1898).

[10] 11 Ohio St. 482 (1860). The court intimated that fixtures which the tenant is, during the tenancy, entitled to remove as a matter of legal right without reference to any contract on the subject, may be removed after the termination of the tenancy by the death of the life tenant lessor. See 11 Ohio St. 482 at 485. It rejected this theory, however, as applied to improvements in the nature of permanent accessions to the freehold, on the authority of White v. Arndt, 1 Whart. (Pa.) 91 (1836). The case is cited generally as supporting the majority rule.

[11] Ray v. Young, 160 Iowa 613 at 616, 142 N. W. 393 at 394.

state that suggested it[12] and has never been cited as a precedent until the instant case where its doubtful authority was rejected.

There is no doubt that the life tenant and the lessees could agree among themselves to treat the warehouses as personalty, but their private agreement could not change the character of the property as far as the remaindermen were concerned.[13] If a tenant for life of land makes a lease for years and dies, the term for years is regarded as so utterly void as not even to be capable of confirmation by the remaindermen.[14] While fixtures and other personal property of the lessees of the life tenant not annexed to the realty would not pass by operation of law to the remaindermen upon the termination of the preceding estate,[15] the same result does not obtain in respect to permanent accessions to the freehold.[16] The lessee who contemplates such permanent improvements, then, must face the risk of loss thereof in case the structures remain on the land at the moment when the right of possession is destroyed by the death of the life tenant or may expose himself to suit for injury to the reversion if he removes them during the term and after the remainderman has acquired rights therein by reason of the attachment to the freehold. His only protection, if it may be called such, is to procure a bond like that exacted in the instant case.[17]

C. J. PRATT

MASTER AND SERVANT—SERVICES AND COMPENSATION—WHETHER OR NOT EMPLOYEE IS ENTITLED TO UNEMPLOYMENT COMPENSATION BENEFITS FROM TERMINATION OF STRIKE TO TIME WHEN RECALLED TO WORK—The

[12] See Saunders v. Sutlire Bros., 187 Iowa 300, 174 N. W. 267, 6 A. L. R. 1503 (1919), and Armstrong v. Rodemacher, 199 Iowa 928, 203 N. W. 23 (1925). See also note in 20 Iowa L. Rev. 849.

[13] Dobscheutz v. Holliday, 82 Ill. 371 (1876), cited with approval in United States v. 19.86 Acres of Land, 141 F. (2d) 344 (1944). See also Horn v. Clark Hardware Co., 54 Colo. 522, 131 P. 405 (1913); Bingaman v. Dahm, 307 Ill. App. 432, 30 N. E. (2d) 509 (1940); Ottumwa Iron Works v. Muir, 126 Mo. App. 582, 105 S. W. 29 (1907); Crosby v. Wolbben, 149 App. Div. 337, 134 N. Y. S. 328 (1912).

[14] Bogle v. North Carolina R. Co., 51 N. C. 419 (1859).

[15] Van Ness v. Pacard, 27 U. S. (2 Pet.) 137, 7 L. Ed. 374 (1829).

[16] Brown v. Ward, 221 N. C. 344, 20 S. E. (2d) 324 (1942), quoted with approval in Pitt v. Speight, 222 N. C. 585, 24 S. E. (2d) 350 (1943).

[17] The bond was so worded as to provide for a decreasing penalty, year by year, as the structures depreciated in value. It was obviously drafted by persons cognizant of the nature of the risk. Any inference that the North Carolina court, in the instant case, would have been inclined to follow the doubtful ruling in Ray v. Young, 160 Iowa 613, 142 N. W. 393 (1913), had the full force of the loss fallen on the hapless intervenors is refuted by the fact that the court, from its language, seemed to consider the presence or absence of such a bond worthy of no more than passing comment.

recent Maryland case of *Saunders* v. *Maryland Unemployment Compensation Board*[1] involved the right of an employee of a certain steel company who had participated in a general strike against the employer to unemployment compensation benefits from the time of the termination of the strike up until he was called back to work, the interim period being necessary to make his department ready for resumption of operations. The unemployment compensation board denied benefits and its action was approved by the nisi prius court. Upon appeal, claimant contended that the statutory provision disqualifying an individual for benefits during any stoppage of work caused by a labor dispute[2] should be interpreted as being limited to the actual period of the strike[3] and that, since no strike existed for the period for which he was claiming benefits, he was not ineligible to receive the same. The judgment was, however, affirmed when the court held that a work stoppage might well continue after the labor dispute was ended but any loss of employment attributable thereto was caused by the strike which had preceded it.

Only one other case can be found bearing directly on the point and it was decided only a little more than a month prior to the case in question. In the Indiana case of *Carnegie-Illinois Steel Corporation* v. *Review Board of Indiana Employment Security Division,*[4] the same result was reached but through a somewhat slightly different approach. The facts were substantially the same and the problem grew up under a similar "stoppage of work" provision but the claimants based their contention upon the fact that the statutory disqualification from benefits was followed by the words "Provided that this subsection shall not apply if it is shown to the satisfaction of the board that: . . . He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work . . .."[5] It was argued that, as the statute was couched in the present tense, it would have to be read as if it said "he is not or was not participating" in order to

[1] — Md. —, 53 A. (2d) 579 (1947).

[2] Md. Code Ann. 1939, Vol. 2, Art. 95A, § 5(d), forbids the payment of benefits "for any week with respect to which the Board finds that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed. . . ."

[3] The term "stoppage of work" has been considered to be synonymous with "strike" in Walgreen Co. v. Murphy, 386 Ill. 32, 53 N. E. (2d) 390 (1944); Board of Review v. Mid-Continent Petroleum Corporation, 193 Okla. 36, 141 P. (2d) 69 (1943). But see contra: Carnegie-Illinois Steel Corp. v. Review Board, — Ind. App. —, 72 N. E. (2d) 662 (1947); Lawrence Baking Co. v. Mich. Unemployment C. Comm., 308 Mich. 198, 13 N. W. (2d) 260 (1944); Umpire's Dec. No. 4665 (England, 1926).

[4] — Ind. App. —, 72 N. E. (2d) 662 (1947).

[5] See Burns' Ind. Ann. Stat. 1933, Vol. 10, 1945 Supp., § 52-1507(f)(3).

eliminate the necessity for a coexistence of the stoppage and the labor dispute. The Appellate Court of Indiana, nevertheless, denied benefits and reversed the ruling of the administrative agency which had granted the same. It pointed out that there are two types of statutes dealing with disqualification for unemployment benefits. One type, such as that in Wisconsin,[6] provides for disqualification for benefits "for any week in which such strike or other bona fide labor dispute is in active progress in the establishment in which he is or was employed." The other, effective in Indiana, does not contain the requirement that the strike be in "active progress" in order to disqualify a worker for benefits. If the Indiana legislature had intended that the strike had to be in active progress to disqualify, said the court, it would have enacted the "active progress" type of statute. Similarly, if the legislature had intended that the stoppage of work and the labor dispute had to be coexistent, it could have made its intent clear by using suitable modifying language in the section in question. Since it had not, the court was of the opinion that benefits should properly be denied when the fact of unemployment is caused by a work stoppage which is the aftermath of a labor dispute in which the claimant has participated.

There are relatively few judicial decisions attempting to define the term "stoppage of work" as found in unemployment compensation statutes. The two cases noted are the only ones dealing with the after-effects of labor disputes. Other cases have considered the application of the term to workers' rights before the dispute has terminated. It has most generally been interpreted as referring to a stoppage of operations in the employing establishment rather than to the work of the individual employee, not only in the few American decisions[7] and the agency rulings[8] but also in the prevailing British interpretations of a statute

[6] Wis. Stats. 1945, Ch. 108, § 108.04(5)(a).

[7] The phrase "stoppage of work" refers to the work and operations of the employer establishment and not to the work of the individual employee: Lawrence Baking Co. v. Mich. Unemployment C. Comm., 308 Mich. 198, 13 N. W. (2d) 260 (1944); Magner v. Kinney, 141 Neb. 122, 2 N. W. (2d) 689 (1942); Deshler Broom Factory v. Kinney, 140 Neb. 889, 2 N. W. (2d) 332 (1942); In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544 (1941).

[8] See "Principles Underlying Labor-Dispute Disqualification" by Marsile J. Hughes, Attachment to Unemployment Comp. Program Letter No. 000 (1946), wherein it was said: "As a general rule, it is safe to say that all of the administrative agencies enforcing the 'stoppage of work' type of provision have followed the general principle established by the British, namely that the term 'stoppage of work' refers primarily to the employing establishment as distinguished from the individual worker. . . ." See also Mich. Referee's Dec. AB-1585 (1939); N. D. App. Trib., Appeal No. 6 (1939); N. J. Bd. Rev., Cases No. BR-12L, BR-15L and BR-65L (1939).

which has been the model for those adopted in this country.[9] Such being the case, the question next presented is when does a work stoppage commence and when does it cease? Substantial curtailment seems to be necessary to initiate the period[10] and there is indication that it continues until there is a substantial resumption of operations,[11] but just what constitutes a "substantial" resumption of operations has been determined in a variety of ways according to the facts at hand.[12]

These considerations are important for they may provide criteria for determining rights after the labor dispute itself has ended. Jurisdictions which see fit to adopt the view of the instant case that a "work stoppage" is not necessarily synonymous with a "strike" or "labor dispute" may yet determine that a work stoppage has ceased during all or part of the time for which benefits are being claimed because substantial operations had been resumed at the employing establishment. It is true that, in the Maryland case mentioned, the claimant's department was one of the last to go back into operation after the strike had terminated, yet the court did not disturb the finding of the board that the stoppage had not ceased.[13] So, too, in the Indiana case, there was a substantial curtailment in production operations which existed throughout the entire time for

[9] Analytic Guide to the Decisions of the Umpire (England, 1939), p. 10, states: "It is not a disqualification that employment has been lost through a trade dispute unless the dispute involves a stoppage of work, and a 'stoppage of work' refers primarily not to the cessation of the workman's labour, but to a stoppage of the work carried on in the factory, workshop or other premises at which the workman is employed. . . ." See also British Umpires' Decisions, Nos. 609, 3809 and 4850 (England, 1926).

[10] Stoppage of work has been interpreted to involve a substantial curtailment of operations in Magner v. Kinney, 141 Neb. 122, 2 N. W. (2d) 689 (1942), and in Deshler Broom Factory v. Kinney, 140 Neb. 889, 2 N. W. (2d) 332 (1942). It has been implied to mean the same thing in Lawrence Baking Co. v. Mich. Unemployment C. Comm., 308 Mich. 198, 13 N. W. (2d) 260 (1944), and in In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544 (1941).

[11] The court in Carnegie-Illinois Steel Corp. v. Review Board, — Ind. App. — at —, 72 N. E. (2d) 662 at 667 (1947), said: "A stoppage of work ceases when operations are resumed on a normal basis." In British Umpires' Decision No. 4665 it was said: "A stoppage is not necessarily limited by the duration of the dispute. If the dispute is settled a stoppage due to that dispute ends when there is a general resumption of work."

[12] A 30% stoppage of operations was considered substantial in Magner v. Kinney, 141 Neb. 122, 2 N. W. (2d) 689 (1942). When 3334 out of 6300 employees returned to work, a stoppage was deemed to have terminated in Ill. Dept. Labor., No. 41-DL-17 (1942). Where employment was only 36% to 54% of normal but production hours were 53% normal, it was held there was no stoppage in Ill. Dept. Labor, No. 40-DL-9 (1940). The fact that seven out of fifty-five employees were on strike was considered a "work stoppage" in N. J. Bd. Rev., BR-15L (1939). It should be noted, however, that the two Illinois administrative rulings mentioned were promulgated before the decision in Walgreen Co. v. Murphy, 386 Ill. 32, 53 N. E. (2d) 390 (1944), wherein a strike was deemed synonymous with a stoppage of work.

[13] See — Md. — at —, 53 A. (2d) 579 at 580 and 585.

which claimants were seeking benefits.[14] But other jurisdictions may differ as to what constitutes substantial curtailment or substantial resumption of operations, thereby lengthening or shortening the period in which benefits may accrue.

Illinois is placed in a peculiar position by the decision in *Walgreen Company* v. *Murphy, Director of Labor*[15] where the court, asked to decide the rights of employees to unemployment benefits before a strike had ended, adopted the language of an Oklahoma case[16] which had treated the term "work stoppage" as being synonymous with "strike." The holding therein, inferring that striking employees are ineligible for benefits during the period of the strike regardless whether the employer's operations have been either partly or substantially brought to an end, raises an implication that the employee might claim benefits as soon as the strike is terminated on the theory that it is the cessation of the employee's work and not the employer's operations that is to be considered the governing criterion up until the termination of the strike. If so, from the moment the strike terminates and the employee is ready to return to work, he would no longer be disqualified by the "stoppage" clause[17] and might assert a right to benefits.[18]

This review of the decisions to date indicates that any attempt to determine the rights of employees to unemployment benefits under the "stoppage" type of statute will ultimately be guided by the definition and application given to the term "work stoppage." The rather slender majority rule appears, at the present, to be that "work stoppage" applies to the operations of the employer rather than those of the employee, with each case to be decided on its own facts as to when the "work stoppage" commences and ceases, but it is likely that other cases will arise in the near future which may change the present balance of opinion.

W. H. GOSTLIN

[14] — Ind. App. — at —, 72 N. E. (2d) 662 at 663.

[15] 386 Ill. 32, 53 N. E. (2d) 390 (1944).

[16] Board of Review v. Mid-Continent Petroleum Corporation, 193 Okla. 36, 141 P. (2d) 69 (1943). That court said that the term "stoppage of work" refers to the employee's activities and not the operations of the employer. The court in Saunders v. Maryland Unemployment Comp. Bd., — Md. —, 53 A. (2d) 579 (1947), indicated that the foregoing Oklahoma case has been considerably weakened by reason of an amendment to the Oklahoma statute: Okla. Stats. 1941, Ch. 40, § 215(d), changing the then existing "active progress" type of statute to the "stoppage" type. See also "Principles Underlying Labor-Dispute Disqualification" by Marsile J. Hughes, Attachment to Unemployment Comp. Program Letter No. 000 (1946).

[17] Ill. Rev. Stat. 1947, Ch. 48, § 223(d), is substantially the same as the typical "work stoppage" provision under discussion.

[18] Further interpretation of the Illinois provision, but not with respect to the right to compensation after strike is over but before work is resumed, may be found

TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION—INFRINGEMENT AND UNFAIR COMPETITION—WHETHER ABSENCE OF COMPETITION PREVENTS ISSUANCE OF INJUNCTION TO RESTRAIN ALLEGED VIOLATION OF TRADE-MARK OR TRADE-NAME—The turbulent mass of judicial authority which keeps the troubled seas of unfair competition at a slow boil may perhaps be stabilized to some degree by a "middle of the road" decision rendered by the Supreme Judicial Court of Massachusetts in the recent case of *265 Tremont Street, Incorporated* v. *Hamilburg*.[1] Plaintiff there sought to enjoin the defendant from using the name of "Shubert" in connection with the operation of a jewelry store and money-lending business in Boston. All of the stock in the plaintiff corporation was owned by the brothers Lee and Jacob J. Shubert, widely-known operators of "Shubert" theaters in many cities throughout the United States including one of the same name in the corporate premises. The defendant, one Zinn, had purchased the jewelry business in question, and the right to use the trade-name of "Shubert Jewelry Co.," from one Jacob Shubert, not connected with plaintiff, who had established the same in one of the buildings owned by the Shubert interests. Upon failure to obtain a renewal of the lease, defendant moved his store to a building adjacent to the Shubert Theater and continued to use the trade name. Injunction was denied by the trial court and that holding was affirmed when the higher Massachusetts court concluded that there was nothing about the "Shubert Jewelry Co." or the conduct of its business which would lead the public reasonably to believe that it was owned, operated or sponsored by the plaintiff corporation. It also pointed out that the litigants were not rivals in competition and no confusion of identity or likelihood of deception appeared probable.[2]

The plaintiff had argued that the court should take cognizance of a growing trend of judicial precedent allowing a remedy by injunction, based on the unauthorized use of a trade-name even though actual competition was lacking,[3] and reject earlier holdings.[4] The court, while

in Fash v. Gordon, 398 Ill. 210, 75 N. E. (2d) 294 (1947), where the court held that the motivation for the strike is unimportant and benefits may not be paid to striking employees for the period of the duration of the strike. See also Local Union No. 11 v. Gordon, 396 Ill. 293, 71 N. E. (2d) 637 (1947), where the court held that if the employees voluntarily abandoned work, even though for the purpose of coercing payment of alleged past-due vacation pay, they were not entitled to unemployment compensation benefits.

[1] — Mass. —, 73 N. E. (2d) 828 (1947).

[2] The court did reverse that part of the decree which had denied injunction against the erection of a sign which encroached on plaintiff's premises but affirmed on the major issue here considered.

[3] See, for example, Tiffany & Co. v. Tiffany Productions, Inc., 147 Misc. 679, 264 N. Y. S. 459 (1932), affirmed in 237 App. Div. 801, 260 N. Y. S. 821 (1932), and in 262 N. Y. 482, 188 N. E. 30 (1933).

[4] The prior rule in Massachusetts is illustrated by Loew's Boston Theatre Co. v. Lowe, 248 Mass. 456, 143 N. E. 496, 36 A. L. R. 919 (1924).

noting the existence of a new statute on the subject,[5] found that neither it nor the earlier cases required any different holding since "no likelihood of deception appearing, the plaintiff cannot prevail . . . even though the absence of competition be treated as no objection."[6] The new statute referred to, whether applicable to the instant case or not, clearly identifies Massachusetts with that growing body of authority which allows a remedy for the unauthorized use of a trade-name even though actual competition or trade rivalry between the parties is wholly lacking, albeit it does make "likelihood of injury" a condition precedent to injunctive relief.

Almost thirty years ago, the federal courts began to adopt the rule that actual competition is not necessarily an essential element where equitable relief is sought.[7] Since then, they have followed that rule in cases too numerous to cite.[8] The courts of Illinois have also gradually accepted that trend, turning from the earlier rule that injunction would be denied in the absence of a showing of palpable deception or actual trade rivalry[9] until this state is now clearly identified with the so-called "federal" rule by reason of the decision in the oft-cited case of *Lady Esther, Limited* v. *Lady Esther Corset Shoppe, Incorporated.*[10] Although that decision has not been subjected to review by the Illinois Supreme Court, there is dictum in the case of *Investors Syndicate of America* v. *Hughes*[11] which would support the view that courts now place less emphasis on competition and more on confusion.

The "palming-off" doctrine, first step away from the harsh common-

[5] Mass. Gen. Laws (Ter. Ed.) 1933, Ch. 110, § 7a, added by Mass. Laws 1947, Ch. 307. That statute reads: "Likelihood of injury to business reputation or of dilution of the distinctive quality of a trade-name or trade-mark shall be ground for injunctive relief in cases of trade-mark infringement or unfair competition notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services."

[6] — Mass. — at —, 73 N. E. (2d) 828 at 831. There is a possibility that the court might have adopted some variation of the so-called "federal" rule if the Massachusetts legislature had not made such a course unnecessary. Because of the new statute, the court refused to enter into any "abstract discussion of academic principles."

[7] Aunt Jemima Mills Co. v. Rigney & Co., 247 F. 407, L. R. A. 1918C 1039 (1918).

[8] For a collection of such cases, see annotation in 148 A. L. R. 6 at 53; 52 Am. Jur., Trade-marks, Trade-names and Trade Practices, §§ 97-9; Nims, Law of Unfair Competition and Trade-Marks, 3d Ed., § 374.

[9] Hughes v. West Pub. Co., 225 Ill. App. 58 (1922).

[10] 317 Ill. App. 451, 46 N. E. (2d) 165, 148 A. L. R. 6 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 74.

[11] 378 Ill. 413, 38 N. E. (2d) 754 (1942).

law rule, was adopted in Illinois over a quarter of a century ago.[12] It now constitutes one of the accepted standards for judging matters of alleged unfair trade competition.[13] It was not until many years later that courts began to recognize that even though the goods, services or business of the litigants were not in actual competition, so palming-off was not possible, still the right to injunctive relief might be placed on the ground that the infringer was unfairly enjoying an increase in his own business unwittingly instituted and financed by the complaining party, yet without any return to the latter on his investment;[14] the infringer thus being unjustly enriched[15] or reaping an unearned profit.[16]

Adherence to the palming-off doctrine, however, does not prevent the existence of other standards. As was said in the Lady Esther case, the holding that "where there was direct competition between plaintiff and defendant there must be a 'palming-off' to warrant relief, is far from saying that courts will not grant injunctive relief where the defendant's conduct is likely to cause confusion of the traders so that the public believes, or is likely to believe, the goods are the goods of the plaintiff, or that the plaintiff is in some way connected with, or is a sponsor of, the defendant. In such situations, relief will be granted although there is no competition."[17] That view had gained adherents not only in the federal system and in Illinois but also in six other states[18] prior to the adoption of the statute above referred to by Massachusetts.

Other courts, while not openly espousing this modern trend, rely on the modified principle expressed by Judge Dennison in *Vogue Company*

[12] Nestor Johnson Mfg. Co. v. Alfred Johnson Skate Co., 313 Ill. 106, 144 N. E. 787 (1924); DeLong Co. v. Hump Hairpin Co., 297 Ill. 359, 130 N. E. 765 (1921).

[13] Before that time, according to Olin v. Bate, 98 Ill. 53, 38 Am. Rep. 78 (1880), the fact that the litigants were not in actual competition would be a controlling issue.

[14] Dodge Bros. v. East, 8 F. (2d) 872 (1925).

[15] See Callman, "He Who Reaps Where He Has Not Sown; Unjust Enrichment in the Law of Unfair Trade Competition," 55 Harv. L. Rev. 595 (1942).

[16] Bond Stores v. Bond Stores, 104 F. (2d) 124 (1939).

[17] 371 Ill. App. 451 at 455, 46 N. E. (2d) 165 at 167. For an historical discussion of the "palming-off" doctrine, see annotation to the Lady Esther case in 148 A. L. R. 6 at 18, and Restatement of Torts, Vol. 3, Introductory Note to Ch. 35, p. 541.

[18] Schwarz v. Schwarz, 93 Cal. App. 252, 269 P. 755 (1928); Yale & Towne Mfg. Co. v. Rose, 120 Conn. 373, 181 A. 8 (1935); Churchill Downs Distilling Co. v. Churchill Downs, 262 Ky. 567, 90 S. W. (2d) 1041 (1936); A. Weiskittel and Sons Co. v. Harry C. Weiskittel Co., 167 Md. 306, 173 A. 48 (1934); Tiffany & Co. v. Tiffany Productions, Inc., 147 Misc. 679, 264 N. Y. S. 459 (1932), affirmed in 262 N. Y. 482, 188 N. E. 30 (1933); Long's Hat Stores Corp. v. Long's Clothes, 224 App. Div. 497, 231 N. Y. S. 107 (1928); Gotham Silk Hosiery Co. v. Reingold, 223 App. Div. 260, 228 N. Y. S. 9 (1928); H. Milgrim & Bros. v. Schlesinger, 168 Ore. 476, 123 P. (2d) 196 (1942).

v. *Thompson-Hudson Company*[19] where he pointed out that: "It has been emphasized also that the doctrine of unfair competition is nothing but a convenient name for the doctrine that no one should be allowed to sell his goods as those of another . . . While the doctrine is usually invoked when there is actual competition between the parties . . . there is no fetish in the word 'competition.' The invocation of equity rests more vitally upon the unfairness."[20] Thus, it has been recognized that a merchant may have a sufficient economic interest in the use of his trade-mark or trade-name outside of the field of his own exploitation to justify the interposition of equitable protection,[21] and that without waiting for a demonstration of confusion from actual experience.[22]

While the instant case establishes no new precedent, the new statute which it serves to highlight is, in itself, worthy of comment.[23] It furnishes another instance of the recognition which ought to be given to the rights of those who build a valued asset in the form of a trade-name or trade-mark. It also delivers a blow to those who would trade on the good will of such a name, for they now possess less reason than before to believe that lack of actual competition should furnish a defense.

C. J. PRATT

VENDOR AND PURCHASER—REQUISITES AND VALIDITY OF CONTRACT—WHETHER AN OPTION TO PURCHASE IN A LEASE WARRANTS SPECIFIC PERFORMANCE WHEN NO PRICE OR TERMS OF SALE ARE STATED—The question of whether a court of equity should grant specific performance of a lease provision, which gave to the lessee the right to purchase the demised premises, was the issue in the recent Massachusetts case of *Shayeb* v. *Holland*.[1] The assignee of the lessee there filed a bill to compel specific performance of a clause in the lease which provided that "the lessee at his option shall be entitled to the privilege of purchasing the aforesaid land and buildings". The lease in no way specified the purchase price or the conditions of sale. The bill alleged, among other things, that under the authorization of the lease the lessee and his assignee had spent large sums of money in improving the premises; money which

[19] 300 F. 509 (1924), cert. den. 273 U. S. 706, 47 S. Ct. 98, 71 L. Ed. 850 (1926).

[20] 300 F. 509 at 512.

[21] Yale Electric Corp. v. Robertson, 26 F. (2d) 972 (1928).

[22] A. Weiskittel & Sons Co. v. Harry C. Weiskittel Co., 167 Md. 306, 173 A. 48 (1934).

[23] For an application of that statute, see the more recent case of Jays v. Jay Originals, Inc., — Mass. —, 75 N. E. (2d) 514 (1947).

[1] — Mass. —, 73 N. E. (2d) 731 (1947).

would be lost if specific performance should be denied. The lower court sustained a demurrer and entered a final decree dismissing the bill, apparently on the ground that the lease provision was too indefinite and uncertain to support a decree of specific performance. On appeal, the Supreme Judicial Court of Massachusetts reversed and ordered specific performance on the ground that (1) the option was supported by the underlying consideration of the lease, was a material term thereof, and was a main inducement for its execution; (2) that in the absence of express stipulations as to purchase price or conditions of sale, the parties must be presumed to have intended the price to be the fair and reasonable value of the premises, payable in cash; and (3) the contract had become mutual by the assignee's acceptance of the option, so that the statute of frauds would not serve as a bar to specific performance.

Although the general problems involved are not new, the case represents an unusual and far-reaching view. The decided cases are in general agreement that an option to purchase contained in a lease is supported by the underlying consideration of the lease, and, when accepted by the lessee or his assigns, becomes a mutual contract.[2] This is held to be true whether the provision be an absolute option, a mere privilege to purchase upon the occurrence of certain events, or one requiring the performance of specified conditions.[3] Consequently, it is generally held that an option, like any other contract, in order to be enforceable, must be definite and certain in its terms.[4] Any lack of harmony in the cases exists as to the requisite degree of certainty needed to justify specific performance.

In that regard, the instant case asserts the proposition that the parties are presumed to have acted in good faith in executing the terms of the lease; so that courts should, if reasonably possible, interpret a contract in order to make a valid and enforceable undertaking rather than one of no force and effect. The principal case again has much

[2] Willard v. Tayloe, 75 U. S. (8 Wall.) 557, 19 L. Ed. 501 (1870); Macy v. Brown, 326 Ill. 556, 158 N. E. 216 (1927); Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555 (1894). See also Williston, Contracts, Rev. Ed., Vol. 5, § 1441.

[3] R. I. Realty Co. v. Terrel, 254 N. Y. 121, 172 N. E. 262 (1930), discusses the distinguishing elements. See also Tantum v. Keller, 95 N. J. Eq. 466, 123 A. 299 (1924), affirmed 96 N. J. Eq. 672, 126 A. 925 (1924).

[4] Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555 (1894); Wolf v. Lodge, 159 Iowa 162, 140 N. W. 429 (1913); Andreula v. Slovak Gymnastic Union Sokol Assembly No. 223, 138 N. J. Eq. 257, 47 A. (2d) 878 (1946); Machesky v. City of Milwaukee, 214 Wis. 411, 253 N. W. 169 (1934).

support in the decisions of other jurisdictions[5] on this point, but despite a desire to validate contracts whenever possible, courts are reluctant, and generally refuse, to read terms and conditions into a contract for which the parties themselves have neither expressly nor impliedly stipulated.[6]

As there was no express stipulation concerning the purchase price, justification for the instant decision must rest on the idea that there was an implied understanding with regard thereto, or else the court would be guilty of rewriting the contract before enforcing it. In support of that conclusion, the court referred to decisions from other jurisdictions, but it should be noted that most of the cases relied on are not in direct point with the principal one. They involve such provisions as a privilege to renew a lease,[7] a provision to increase the rent during the period of the lease,[8] agreements involving public or quasi-public bodies,[9] or executory contracts for specially made goods.[10] The only case appearing to substantiate the view taken is that of *Wilson* v. *Brown*[11] wherein the provision involved reserved to the lessors the right to sell the property at any time, but directed that, in case of sale, preference to purchase the property should be given to the lessees. The lessees there filed a bill to compel the conveyance of the property, which had already been transferred to a third party; and the lower court decreed that upon payment by the lessees of a sum equal to the reasonable value of the premises, the transferee was to convey the premises to the lessees by warranty deed. That decision was affirmed, but there was no discussion of the sufficiency of the option provision, the decision turning on a probable waiver of the preferential feature.

There appears to be no other case reaching the conclusion of the one at hand. The case most favorable to the concerned view is that of *Morris* v. *Ballard*,[12] in which the court held that a lessor who lets a tenant into possession, with an option in the lease to purchase the

[5] One case will serve as an illustration: Morris v. Ballard, 56 App. D. C. 383, 16 F. (2d) 175, 49 A. L. R. 1461 (1926). For a more complete list, see John Norton Pomeroy, A Treatise on the Specific Performance of Contracts (by John Norton Pomeroy, Jr. & John C. Mann) (Banks & Co., Albany, N. Y., 1926), 3d Ed., § 145 et seq.

[6] Folsom v. Harr, 218 Ill. 369, 75 N. E. 987, 109 Am. St. Rep. 297 (1905); McClung Drug Co. v. City Realty & Investment Co., 91 N. J. Eq. 216, 108 A. 767 (1919).

[7] Hall v. Weatherford, 32 Ariz. 370, 259 P. 282, 56 A. L. R. 903 (1927).

[8] Bird v. Couchois, 214 Mich. 607, 183 N. W. 36 (1921).

[9] Joy v. City of St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 L. Ed. 843 (1891); Slade v. City of Lexington, 141 Ky. 214, 132 S. W. 404 (1910).

[10] Hoadly v. M'Laine, 10 Bing. 482, 131 Eng. Rep. 982 (1834).

[11] 5 Cal. (2d) 425, 55 P. (2d) 485 (1936).

[12] 56 App. D. C. 383, 16 F. (2d) 175, 49 A. L. R. 1461 (1926).

demised premises at a stated price on terms to be agreed upon, cannot, after the tenant has made extensive improvements on the faith of his option, refuse to perform because he has not agreed to the terms, but will be compelled to accept a tender of cash, less the valid incumbrances then existing on the property, for failure to specify acceptable terms. A similar attitude was taken in the earlier case of *Swedish-American National Bank* v. *Merz*,[13] where the option provided that the specified price was to be paid in such manner and form as should be agreeable to the contracting parties, in the event of the exercise of the option. The court granted specific performance on the ground that the law would imply that the payment of the price should be made in a reasonable time and in money since the contract on its face showed that the parties had not agreed upon any other manner and form of such payment. In the first of these cases the court recognized the necessity for a method of payment but apparently applied the doctrine of equitable estoppel; in the latter, the court advanced the belief that the terms of payment were not a material part of the contract. In both cases, however, there was a tender of the designated price; in the instant case there was neither a specified price nor an actual tender of performance. While there may be some justification for the results reached in these cases, the need for certainty and freedom of contract necessitates a very strict application of such principles. It is for this reason, therefore, that the weight of authority is to the contrary.[14]

Holdings with regard to analogous lease provisions may help to evaluate the soundness of the instant case. Where the lessee is given a privilege to buy the demised premises upon such terms and price as any other person or purchaser might have offered to the lessor, the basic case of *Hayes* v. *O'Brien*[15] indicates that, when the price and

[13] 179 N. Y. S. 600 (1919). Compare with Brandenburg & Marx, Inc. v. Heimberg, 34 N. Y. S. (2d) 935 (1942). For a good discussion of the point, see also Volk v. Atlantic Acceptance & Realty Co., 139 N. J. Eq. 171, 50 A. (2d) 488 (1947).

[14] See Bean v. Holmes, 236 S. W. 120 (Tex. Civ. App., 1922), rehear. den., 240 S. W. xv, wherein the court declared that an option in a lease providing that the purchase price was to be paid in the manner agreed upon by the parties at the time of the exercise of the option, was too indefinite and incomplete to warrant either specific performance or an action for damages. See also Sander v. Schwab, 315 Ill. 623, 146 N. E. 509 (1925); Folsom v. Harr, 218 Ill. 369, 75 N. E. 987, 109 Am. St. Rep. 297 (1905); Monahan v. Allen, 47 Mont. 75, 130 P. 768 (1913); Driebe v. Fort Penn Realty Co., 331 Pa. 314, 200 A. 62, 117 A. L. R. 1091 (1938). The court in the instant case cited Sander v. Schwab, 315 Ill. 623, 146 N. E. 509 (1925) as being contrary to the view it was taking.

[15] 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555 (1894), followed in Scheidecker v. Westgate, 164 Ill. App. 389 (1911). See also Slaughter v. Mallet Land & Cattle Co., 72 C. C. A. 436, 141 F. 282 (1905), cert. den. 201 U. S. 646, 26 S. Ct. 761, 50 L. Ed. 903 (1906).

terms are determined according to that mode, the contract becomes as perfect as if the details had been originally specified and is not so indefinite and uncertain as to preclude specific performance. If, however, the lessee is given merely a first chance[16] or a refusal[17] to purchase, then most courts will hold the provision to be too indefinite and uncertain.

Another common provision permits the lessee to buy at a price to be fixed by arbitration or appraisal. Although a few early cases held that specific performance of the contract to sell would not be decreed where the appraisers failed to agree upon the price,[18] later decisions have adopted a more liberal attitude; and it has been held that, where appraisal or arbitration has failed, the court will decree specific performance at a fair and reasonable price[19] or at the market value less the incumbrance of the lease.[20] Such a view is well justified as the price attained represents one which would have been the ultimate result of a successful appraisal or arbitration. But there would seem to be a substantial difference between provisions setting up machinery by which an implied price can be determined and the instant one, silent on the subject, so these analogies lend no support to the decision. It is also a logical *non sequitur* to say that, because the parties have not negatived an intention to sell and buy at a fair price, they must intend that a reasonable price should control.[21]

One other point remains for consideration, and that is the question of compliance with the statute of frauds. That point has seldom been

[16] Folsom v. Harr, 218 Ill. 369, 75 N. E. 987, 109 Am. St. Rep. 297 (1905), wherein the court held that a term in the lease providing that should the lessor conclude to sell, then the lessee should have first chance to buy, but stating no price nor method of ascertaining it, was too uncertain and indefinite to be specifically enforced as an agreement to convey to the lessee. The case is distinguished in Scheidecker v. Westgate, 164 Ill. App. 389 (1911).

[17] Fogg v. Price, 145 Mass. 513, 14 N. E. 741 (1888). The instant case attempted to distinguish the holding therein on the ground that the clause in question negatived any intention to sell at the reasonable value, hence prevented any reading in of an implied term.

[18] Milnes v. Gery, 14 Ves. Jun. 400, 33 Eng. Rep. 574 (1807); Greason v. Keteltas, 17 N. Y. 491 (1858).

[19] Coles v. Peck, 96 Ind. 333, 49 Am. Rep. 161 (1884).

[20] Wm. P. Rae Co. v. Courtney, 250 N. Y. 271, 165 N. E. 289 (1929). See also Bewick v. Mecham, 26 Cal. (2d) 92, 156 P. (2d) 757 (1945).

[21] In the earlier case of Conos v. Sullivan, 250 Mass. 376 at 378, 145 N. E. 529 at 530 (1924), the court said: "The rights and obligations of the parties . . . cannot be fully ascertained from its terms, and as specific performance can be decreed only under a completed contract, it is immaterial that the valuation for the additional term may be determined by evidence. The case must be decided on the terms of the lease."

an issue in the cases involving options to purchase, for the primary concern has been one as to the certainty of the option. In the New Jersey case of *Cerrato* v. *Megaro*,[22] however, the court held that a provision giving to the lessee a first preference to purchase the premises, but which lacked a stated or ascertained price, was an insufficient memorandum to satisfy the statute. As that memorandum should contain on its face, or by reference to others, a clear description of the property to be conveyed, together with the terms, if any, and the price to be paid or other consideration, it is not surprising to find that this essential information may not rest partly in writing and partly in parol.[23] Yet the court in the instant case deemed the option sufficient. It might be argued that as the plaintiff had been in possession and had made extensive improvements in reliance upon the option, it would be a fraud upon him to refuse specific performance,[24] but whenever that principle has been invoked, the improvements were made by one in his character as purchaser, not tenant, and then only where the oral agreement contained all the essential elements of a contract. There seems, then, to be no evident reason why the option provision here concerned should be exempt from these rules, so the decision may be said to be one in which the court has taken an unprecedented step in two respects.

R. C. KEIL

[22] 96 N. J. Eq. 722, 126 A. 531 (1924). Compare with Swedish-American National Bank v. Merz, 179 N. Y. S. 600 (1919).

[23] Sander v. Schwab, 315 Ill. 623, 146 N. E. 509 (1925). See also Marske v. Willard, 169 Ill. 276, 48 N. E. 290 (1897).

[24] Fierke v. Elgin City Banking Co., 359 Ill. 394, 194 N. E. 528 (1935).

BOOK REVIEWS

THE COURT OF COMMON PLEAS IN FIFTEENTH CENTURY ENGLAND: A Study of Legal Administration and Procedure. Margaret Hastings. Ithaca, New York: Cornell University Press, 1947, Pp. xviii, 302.

It has been suggested that people are inclined to carry the tendency toward specialization to extremes. As such a tendency generally appears with maturing civilization, the western world has carried specialization to the point where in fact it now tends to make us less civilized as individuals.[1] Overspecialization, wherever it arises at the expense of general perspective in education, should be approached with caution. So, because Dr. Hasting's study may appear at first sight to have usefulness only for antiquarians and historical bibliographers and, therefore, a bit uncivilizing in its specialization, there may be a natural concern about the place of this book in the literature of the law.

The avowed objectives of the study are two. First, by collecting in one volume information heretofore widely scattered and not easily manageable by the ordinary student, the author sought to facilitate the use and interpretation of the original records of the central courts of common law during the late Middle Ages. Secondly, by studying the workings of the most active of these courts from its actual records, to-wit: the plea rolls and the correspondence of the period, the author believed it possible to correct certain erroneous impressions contained in studies heretofore made based upon the Yearbooks, ancient treatises and secondary sources. The author has arranged the information gathered from her chosen sources into four divisions. One deals with the business of the court, its records and a typical day in court; a second describes its personnel, from the justices and the sergeants down to the filacers and messengers; a third contains illustrations of the use of the original writs, mesne process, pleadings, as well as the trial, judgment and execution; the final part discusses hinderances upon the administration of justice and undertakes to make an overall evaluation of the work of the court during the period in question. Five appendices contain valuable compilations of such mysteries as the schedule of fees to be paid into court in the course of a law suit, a list of the return days for the writs, and the identities of the various clerks and keepers of the writs whose marks appear on the original plea rolls of the period. All of this handily accomplishes Dr. Hasting's immediate purpose and should inspire other similar projects designed to free students of social and legal history from dependence upon theories reconstructed from secondary sources.

[1] Hurst, "Legal History: A Research Program," 1942 Wis. L. Rev. 319-333.

Studies such as this contain much that would be of great value in an essential rewriting of Anglo-American legal history now waiting to be undertaken. It is clear that our legal history should be rewritten with the common law kept more firmly in mind than has been usual in the past. There is need, for example, to explain how our present dichotomy of public and private law is not entirely a product of sixteenth and seventeenth century experiences without ancestral roots in the common law. There is occasion to note how, prior to the seventeenth century, the King's Prerogative and Littleton's Tenures were but parts of the same ancient customary common law functioning as the fundamental law of the land. Often overlooked is the fact that, even in the age of uncontested legislative supremacy, the common law remained a reserve of experience from which statutory law could be drawn. Too often this common source of all public and private law is insufficiently understood or its lessons not applied with full advantage to present day problems of interpretation.[2] Dr. Hasting's study, dealing as it does with what Sir Matthew Hale once called the "golden age of common law pleading," furnishes many valuable insights into the litigious past of English society. It should prove of great value to anyone undertaking a reexamination of the common law.

One thing more might be said, and that rather by way of notice than criticism. It is inevitably a delicate matter to present a study dealing with legal administration and procedure in a way that catches and holds the reader's attention. One preparing a study of the type Dr. Hastings has undertaken must write with a certain audience in mind. There are parts of this book that will please and fascinate anyone who enjoys historical reading but it is principally a book for scholarly consumption. Many of its points are elaborated and explained with far more detail than the casual historian will care to follow as he fills out his knowledge of the subject. The arrangement of that information, within each unit of the study, is almost always such that the reader must resort to solid reading; he may not scan. These, however, are inevitable characteristics of the style of presentation chosen by the author. Far from being a detraction, they should enhance the value of the work to those who form the audience to which it was addressed.

R. D. NETHERTON

[2] See, for example, comments by Charles H. McIlwain on reviewing Knappen, "Constitutional and Legal History of England," 10 U. of Chi. L. Rev. 97-8. See also Boorstin, "Tradition and Method in Legal History," 54 Harv. L. Rev. 424-36, and Pound, "New Possibilities of Old Materials of American Legal History," 40 W. Va. L. Q. 205-11.

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